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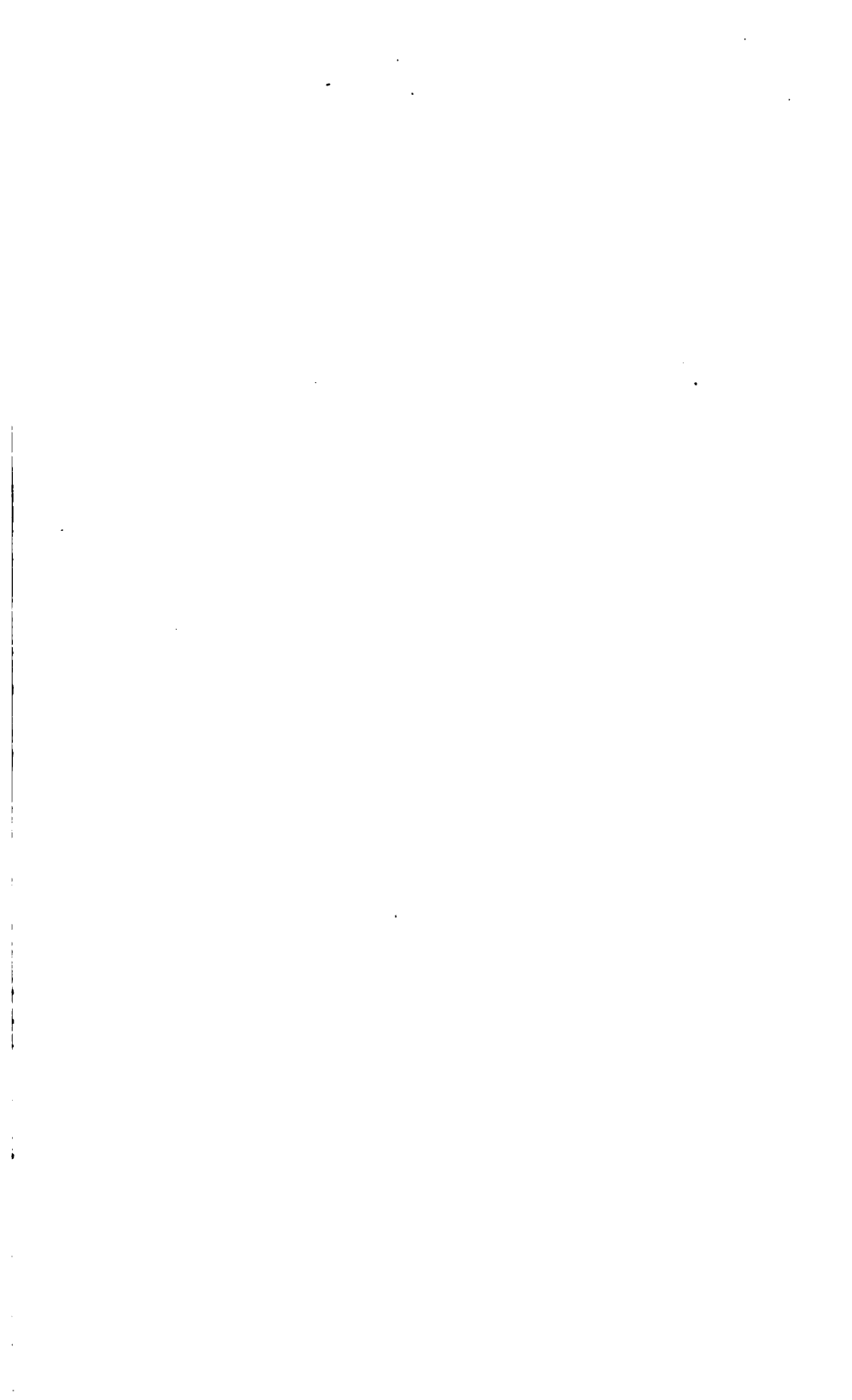
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REPORTS
OF
DECISIONS
IN
THE SUPREME COURT
OF
THE UNITED STATES.

WITH NOTES, AND A DIGEST.

By B. R. CURTIS,
ONE OF THE ASSOCIATE JUSTICES OF THE COURT.

VOL. XIX.

FIFTH EDITION,
REVISED WITH REFERENCE TO THE LATEST DECISIONS.

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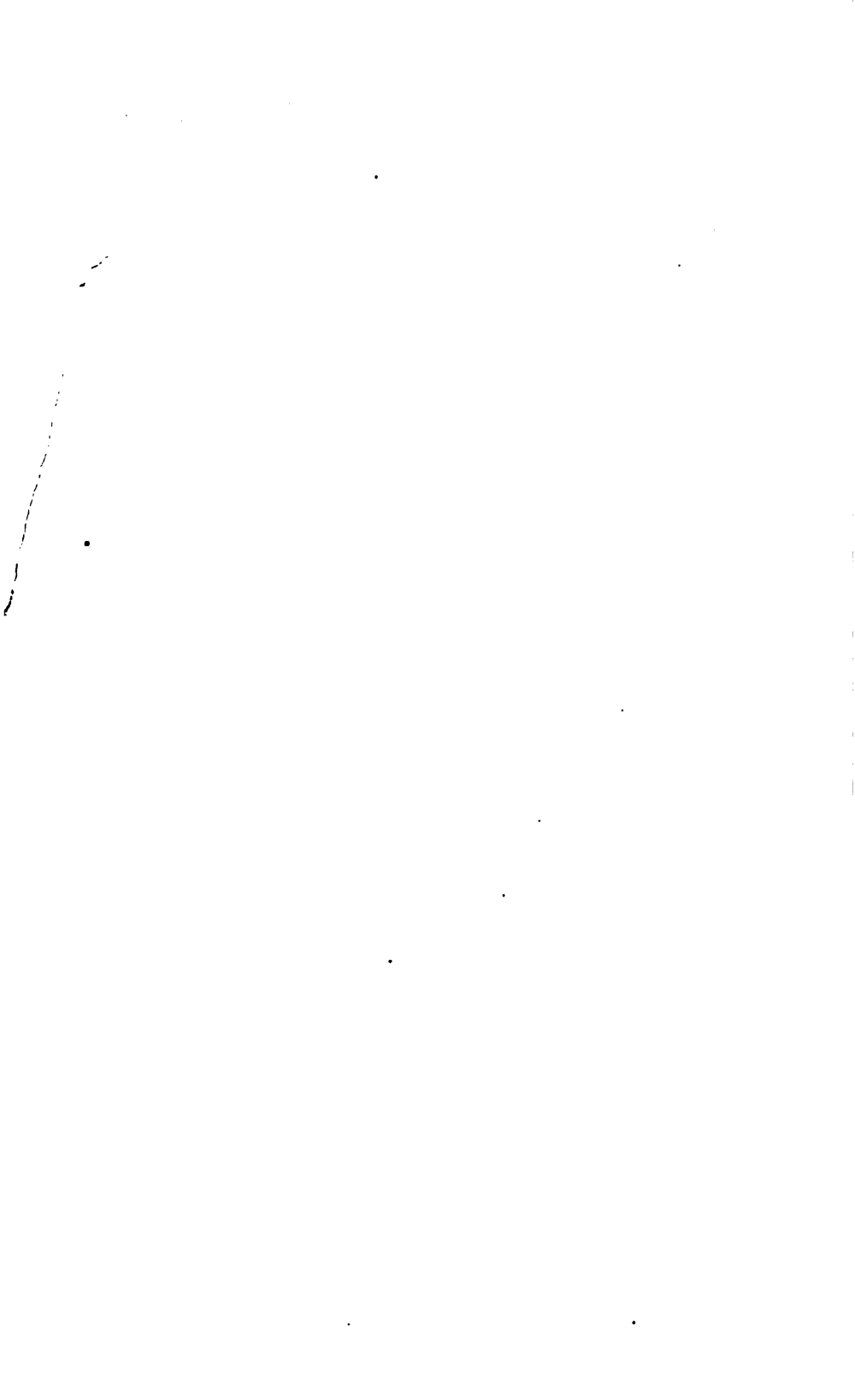
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DECISIONS
OF THE
SUPREME COURT OF THE UNITED STATES.
DECEMBER TERM, 1851.

JUDGES DURING THE TIME OF THESE REPORTS.

HON. ROGER B. TANEY, CHIEF JUSTICE.

HON. JOHN M'LEAN,

HON. JAMES M. WAYNE,

HON. JOHN CATRON,

HON. JOHN M'KINLEY,

HON. PETER V. DANIEL,

HON. SAMUEL NELSON,

HON. ROBERT C. GRIER, AND

HON. BENJAMIN R. CURTIS.

} **ASSOCIATE JUSTICES.**

JOHN J. CRITTENDEN, Esq., ATTORNEY-GENERAL.

WILLIAM THOMAS CARROLL, Esq., CLERK.

BENJAMIN C. HOWARD, Esq., REPORTER.

RICHARD WALLACH, Esq., MARSHAL.

**THE PRESIDENT, DIRECTORS, AND COMPANY OF THE MINERS' BANK
OF DUBUQUE, Plaintiffs in Error, v. THE STATE OF IOWA, on the
Relation of the District Prosecuting Attorney.**

12 H. 1.

Under the 25th section of the judiciary act of 1789, (1 Stats. at Large, 85,) this court cannot reëxamine the decision of a state court, that a law of a territory was not repugnant to the constitution of the United States.

Though by the fundamental law of a territory its legislation is to be subject to the disapproval of congress, yet till disapproved it is valid and operative; it does not owe its effect to the action of congress thereon, so as to become an act of congress.

THE case is stated in the opinion of the court.

Lawrence, for the plaintiff.

No counsel *contra*.

[* 4] * DANIEL, J., delivered the opinion of the court.

By a statute approved on the 20th of April, 1836, congress, within the boundaries designated by that statute, established the territorial government of Wisconsin, *vide* 5 Stats. at Large, 10 to 16; and by a subsequent law, approved June the 12th, 1838, congress divided the territory of Wisconsin, and established over what had formed a portion of that territory, the territorial government of Iowa. *Vide* 5 Stats. at Large, 235 to 241. On the 3d of March, 1845, the territory of Iowa was admitted into the Union, as one of the States of this confederacy, *vide* 5 Stats. at Large, 742, and on the 3d day of March, 1847, the like admission was extended to the territory of Wisconsin. *Vide* 9 Stats. at Large, 178. By what may be termed the organic laws creating the governments of both the territories above mentioned, it will be seen, that those governments were vested with general legislative power; and were subjected to no enumerated or specific limitations of that general power, save in certain exceptions applicable to the lands or other property of the United States, and to the right on the part of those governments, in exercising the power of taxation, to discriminate between the property of residents and non-residents. The language of the provisions here referred to is identical in the laws establishing each of these territories, and is in the following words: "That the legislative power of the territory shall extend to all rightful subjects of legislation, but no law shall be passed interfering with the primary disposal of the soil, no tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands of residents." Each of those provisions contains the following declaration: "All laws of the governor and legislative assembly shall be submitted to, and if disapproved by the congress of the United States, the same shall be null and of no effect." *Vide* 5 Stats. at Large, p. 13, and *ibid.* p. 237, § 6.

By a law of the territorial legislature of Wisconsin, approved on the 30th of November, 1836, the plaintiffs in error were created a corporation by the style of the Miners' Bank of Dubuque, to continue until the 1st day of May, 1851. *Vide* Acts of Legislature of Wisconsin of 1836, p. 18, No. 7. By an act of congress, approved on the 3d of March, 1837, 5 Stats. at Large, 198, the charter granted by the legislature of Wisconsin was disapproved and annulled in certain particulars; but allowed and left in force as to the provisions

not thus vacated, and contained, amongst other provisions, (section 23,) the following: "That this act be and the same is hereby declared to be a public act, and that the same be for the time before limited, construed in all courts and places benignly, and favorably, for every *beneficial purpose therein mentioned. [* 5] Provided, that if such corporation shall fail to go into operation, or shall abuse or misuse their privileges under this charter, it shall be in the power of the legislative assembly of this territory at any time to annul, vacate, and make void this charter." After the separation of Iowa from Wisconsin, the legislature of the former territory, (the Bank of Dubuque being situated within the government thereof,) by an act of the 21st of May, 1845, repealed the act of incorporation of the Miners' Bank; directed, under the supervision of the court of the district, the settlement by trustees of the affairs of that corporation, and the distribution of its assets amongst the creditors and stockholders thereof. *Vide* Laws of Iowa Ter. c. 31. In pursuance of this law, the prosecuting attorney for the territory, on the 10th of August, 1845, filed an information in the nature of a writ of *quo warranto* against the President, Directors and Company of the Bank of Dubuque, as usurpers, upon the authority of the United States, of the privileges and franchises of a banking corporation. To this information the plaintiffs pleaded the act of incorporation by the legislature of Wisconsin, as altered by the act of congress, and the division of the territory of Wisconsin, and the creation of the government of Iowa, in justification of their corporate rights. To this plea, it is replied for the United States, that the act of the legislature of Wisconsin, by which the defendants were incorporated, had, after the separation of the territories, been repealed by an act of the legislature of Iowa, within whose jurisdiction the corporation existed. The plaintiffs in error (the defendants below) rejoined, that the repealing act of the legislature of Iowa had been passed without the said corporation having failed to go into operation, and without having misused or abused its privileges. On behalf of the United States there was a demurrer to this rejoinder, and in the mean time the territory of Iowa having become a State, this case was tried before the supreme court for the second judicial district of the State, by which tribunal the demurrer was sustained, and judgment of ouster pronounced against the bank.

By the plaintiffs in error it is insisted that the averments in their rejoinder being admitted by the demurrer, it follows, *ex consequenti*, that the repealing law of the territory of Iowa was unconstitutional, as a law arbitrarily abrogating the charter of the bank, and therefore a law impairing the obligation of a contract. In reviewing this case

thus made, this court do not consider themselves called upon to test either the power of the government of Iowa for the enactment of the statute complained of, the coincidence or incompatibility of that statute with the 10th section of the first article of the constitution, or *regularity of the proceedings in the court below. At the threshold of their examination of this case, they are met by an inquiry far more important and controlling than either of these, namely, an inquiry into their own authority to effect, under any aspect under which this case is presented to them, the result which is sought at their hands? Whatever authority there exists in this court to reëxamine and reverse the judgments or decrees of the courts, not those regularly appertaining to the organized judicial system of the United States, such authority must be traced to the 25th section of the law establishing the "Judicial Courts of the United States," by which section alone the power of this court for the purposes above stated was created and is clearly defined. By recurrence to that section it will be perceived, in order to give the corrective power to this tribunal, that, by the decision of the state court, there must have been "drawn in question the validity of a statute or an authority exercised under the United States, and the decision be against their validity;" or it must be "where is drawn in question the validity or statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed under such clause of the constitution, treaty, statute, or commission." By a comparison of the record before us with the section of the judiciary act above quoted, we think it nowhere apparent that there has been, by the decision of the court of Iowa, drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, much less that there has been a decision against the validity of either; or that there has been drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of its being repugnant to the constitution, treaties, or laws of the United States, or the construction of any clause of the constitution, or of any treaty or statute of or commission held under the United States, and a decision adverse to the validity of the latter. And it may be observed that every requisite to form a ground of jurisdiction enumerated in each of the predicaments comprised in the statute, must combine in order to give to this court the power invoked by the

plaintiffs in error. The alleged wrong which the court are called on to redress, is not an act of state power at all; it is an act of the territorial government of Iowa, by which was repealed an act of the preceding territorial government * of Wisconsin; [* 7] consequently the decision of the court below asserted no state act or power in opposition to the constitution, treaties, or laws, or to a commission or authority of or under the United States, and presents therefore no ground of jurisdiction here, either as derived from the language of the statute, or from any construction heretofore given of it. If the question whether a writ of error would lie from this court to review the acts of the territorial governments could ever have been regarded as in any sense equivocal upon the language of the 25th section of the judiciary act, such a question could not now be considered as open, under the express adjudications previously ruled by this court. Thus, in the case of *Scott v. Jones*, 5 How. 343, it was expressly declared "that an objection to the validity of a statute on the ground that the legislature which passed it were not competent or duly organized, under the acts of congress and the constitution, so as to pass valid statutes, is not within the cases enumerated in the 25th section of the judiciary act, and therefore this court has no jurisdiction over the subject; that, in order to give this court jurisdiction, the statute, the validity of which is drawn in question, must be passed by a State a member of the Union, and a public body owing obedience and conformity to its constitution and laws; that if public bodies, not duly admitted into the Union, undertake as States to pass laws which might encroach on the Union or its granted powers, such conduct would have to be reached either by the power of the Union to put down insurrection, or by the ordinary penal laws of the States or territories within which these bodies are situated and acting; but their measures are not examinable by this court upon a writ of error. They are not States, and cannot pass statutes within the meaning of the judiciary acts." Other cases cited by the court, in the opinion just quoted, might be adduced to show the difference ever taken by the court in reference to its relation to the States as States, and as contradistinguished from the territories of the United States. It seems to us that the control of these territorial governments properly appertains to that branch of the government which creates and can change or modify them to meet its views of public policy, namely, the congress of the United States. That control certainly has not been vested in this court, either in mode or in substance, by the 25th section of the judiciary act.

It has been argued in this case, that, as congress, in creating the territorial governments of Wisconsin and Iowa, reserved to them-

selves the power of disapproving and thereby annulling the acts of those governments, and had, in the exercise of that power, stricken out several of the provisions of the charter of the Bank of [* 8] * Dubuque, enacted by the legislature of Wisconsin, assenting to the residue ; that, therefore, the charter of this bank should be regarded as an act of congress, rather than of the territorial government ; and, consequently, the decision of the state court, in favor of the repealing law of Iowa, must be held to be one in which was drawn in question and overruled the validity of a statute of or an authority exercised under the United States, and as a decision also against a right, title, or privilege set up under a statute of the United States. The fallacy of this argument is easily detected. Congress, in creating the territorial governments, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves, whilst, for considerations equally strong, they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. A different system of procedure would have been fatal to all practical improvement in those territories, however urgently called for ; nay, might have disarmed them of the very power of self-preservation. An invasion, or insurrection, or any other crisis demanding the most strenuous action, would have had to remain without preventive or remedy till congress, if not in session, could be convened, or, when in session, must have awaited its possibly procrastinated aid.

The argument would render, also, the acts of the territorial governments, even the most wholesome and necessary, and though indispensably carried to the extreme of authority, obnoxious to the charge of usurpation or criminality. The reverse of this argument, whilst it is accordant with the investiture of general legislative power in the territorial governments, places them in the position of usefulness and advantage towards those they were bound to foster, and subjects them at the same time to proper restraints from their superior. The charter of the Bank of Dubuque, enacted in all its details and powers ever possessed by it, (and according to which it was in fact organized,) by the legislature of Wisconsin, must be looked upon as the creature of that legislature. To regard it, as we are urged to do by the argument for the plaintiff in error, would constitute it rather a Bank of the United States, situated without the United States, and operating within the territory of Wisconsin, now the State of Iowa, independently of the power or local policy of that State, and beyond the reach of its faculties or obligations to be exerted for its own citi-

Binns v. Lawrence. 12 H.

zens. We think that the positions urged for the plaintiff in error leave the objections to the jurisdiction, as above stated, in their full force. We regard both the charter granted by Wisconsin, and the repeal of that charter by Iowa, * alike as acts of the [* 9] territorial authorities, and not as the acts of any State of this Union; and that, as such, this court has no power, by writ of error, to take cognizance of them in virtue of, and for the objects designated by, the 25th section of the judiciary act.

We therefore adjudge that the writ of error in this case be dismissed for want of jurisdiction.

19 H. 393.

WILLIAM BINNS and C. STOCKTON HALSTEAD, Plaintiffs, v. CORNELIUS W. LAWRENCE.

12 H. 9.

Under the tariff act of July 30, 1846, (9 Stats. at Large, 44, sched. B,) glass tumblers, having the entire surface or bottom smoothed, or polished, or their sides figured, or ornamented by cutting, or grinding, are "glass cut," and subject to a duty of 40 per centum *ad valorem*.

THE case is stated in the opinion of the court.

Patten, for the plaintiffs.

Crittenden, (attorney-general,) *contra*.

* DANIEL, J., delivered the opinion of the court. [* 14]

This was an action brought by the plaintiffs, importers of glassware, against the defendant, as collector of the port of New York, to recover a certain amount of money paid under protest to the defendant as collector, for duties exacted by him upon glass tumblers imported by the plaintiffs at the period set forth in an exhibit filed in the cause, by which are also shown the duties charged by and paid to the defendant, and the amount claimed by the plaintiffs, as having been improperly exacted; this last amount, consisting in each instance of the difference between the duty of 40 per centum *ad valorem*, charged under schedule B of the tariff act of July 30, 1846, as on importations of "glass cut," and the duty of 30 per centum *ad valorem*, at which rate the plaintiffs claimed to enter their importations of glass above mentioned, under schedule C of the same act of congress, as "glass tumblers plain, moulded, or pressed, not cut or punted"

The question of law upon the construction of the statute [* 15] * of 1846, upon which the judges differed in opinion, and the facts of the case out of which that question has grown, cannot be stated with greater clearness, or with more succinctness of form, than they have been in the certificate from the circuit court.

This cause having been tried before his honor Justice Nelson, on the 3d of November, 1848, the jury impanelled returned a verdict for the defendant. The counsel for the plaintiff having excepted to the charge of the presiding judge on the trial, the cause was heard upon the exception reserved for the plaintiff, involving the question, whether, according to the true construction of the act of congress of 30th of July, 1846, entitled "An act reducing the duty on imports and for other purposes," glass tumblers, the bottoms of which have been smoothed or flattened by the process of cutting or grinding, and glass tumblers which have been engraved on the sides by a similar process, should be charged with the duty of 40 per centum *ad valorem*, under schedule B of said act, as "glass cut," or with the duty of 30 per centum *ad valorem*, under schedule C of said act, as "glass tumblers plain, moulded, or pressed, not cut or punted."

On which question, the opinion of the judges of the court were opposed.

Whereupon, on motion of the said plaintiffs by their counsel, that the point upon which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified under the seal of this court to the supreme court to be finally decided.

It is ordered, that the following statement of facts, which is made under the direction of the judges, be certified according to the request of the said plaintiffs, and the statute in such case made and provided.

Statement of Facts.

That the tumblers in question consisted of two kinds, as follows :

1. Glass tumblers, the entire surface of the bottoms of which had been smoothed by the glass-cutter or grinder, previous to their importation by the plaintiffs.

2. Glass tumblers, on the sides of which ornamental figures had been engraved by the glass-cutter or engraver, previous to such importation.

That the tumblers in question of the first class, are only known in trade and commerce in the city of New York as "plain tumblers," or as "plain smooth-bottomed tumblers," or as "plain tumblers with flattened bottoms."

That the tumblers in question of the second class, are only

"known in trade and commerce in said city as "engraved [* 16] tumblers."

That the tumblers in question (of both classes) are not known in trade and commerce in said city as "cut glass."

That all the material witnesses for the plaintiffs were merchants, importing and dealing in glassware.

That all the material witnesses for the defendant were manufacturers of glassware, or glass-cutters and grinders.

That the designation "cut glass," as used in trade and commerce in said city, applies only to tumblers the sides of which have been cut or ground, and that the importers of glassware and dealers in glassware in said city do not consider tumblers of the description in question in this suit, as coming within the designation, and if they received an order from a customer for "cut glass tumblers," would not regard it as including either smooth-bottomed or engraved tumblers.

That by the testimony of the manufacturers and operatives, glass tumblers are manufactured entirely by the glassblower, or in part by the glassblower and in part by the glasscutter or grinder, and that glass blowing and glass cutting are distinct and separate trades, and processes of manufacture.

By the same witnesses. That the bottoms of glass tumblers, manufactured entirely by the glassblower, are rough, particularly in the centre, being there broken off from the punt or stick on which made; and that when sold in this condition, such tumblers are known in trade and commerce in the city of New York as "plain," or "plain rough-bottomed tumblers."

By the same witnesses. That, after their completion by the glassblower, such rough-bottomed tumblers frequently pass into the hands of the glasscutter, or grinder, by whom the centre of the bottoms of such tumblers is cut or smoothed, for the purpose of removing the particular roughness of that part of the tumbler, and that the process of thus cutting or smoothing the centre of the bottoms of such tumblers is called punting; and that tumblers manufactured by the glassblower, but the centre part of the bottoms of which have been so cut or smoothed by the glasscutter, are known in trade and commerce as "punted" tumblers.

By the same witnesses. That, after their completion by the glassblower, such rough-bottomed tumblers frequently pass into the hands of the glasscutter or grinder, by whom the entire surface of the bottoms of such tumblers is cut or smoothed, and that tumblers manufactured by the glassblower, but the entire bottoms of which have been cut or smoothed by the glasscutter or grinder, are known in

trade and commerce as "plain tumblers," or as "plain [* 17] smoothed-bottomed tumblers," or as "plain * tumblers with flattened bottoms," and are similar to the tumblers in question of the first class.

By the same witnesses. That tumblers known in trade and commerce, and amongst manufacturers, as "moulded tumblers," or "pressed tumblers," are also made entirely by the glassblower; and are also rough-bottomed until subjected to the process of punting, or smoothing and cutting above described.

By the same witnesses. That all cutting of glass is done by means of grinding upon wheels, and that there is no such thing as the cutting of glass in the manufacture of "cut glass" in any other way.

By the same witnesses. That the cutting or smoothing of the bottoms of the tumblers in question, (of the first class,) is done by the glasscutter, and that the process of cutting and smoothing is identical with that of punting, except that it extends to the entire surface of the bottom of the tumblers, whereas the "punting" is limited, as above stated, to the centre of the bottom merely.

By the same witnesses. That the process of "punting," and the process of "cutting or smoothing" the bottoms of the tumblers in question, are identical in their operation with that of cutting the sides of tumblers, known in trade and commerce as "cut glass."

It was proved that the time required to cut or smooth the bottoms of the tumblers in question, (of the first class,) is four or five times as long as that required for "punting" the bottoms of punted tumblers; and that tumblers with the bottoms cut or smoothed, cost from eighteen to twenty-two cents per dozen more than punted tumblers.

It was proved that the "punted" tumblers are charged with the duty of 40 per centum *ad valorem* under the tariff act of 1846.

It was proved by the manufacturers and operatives, that the process of engraving the tumblers of the second class is similar to that of cutting the tumblers of the first class, but is a finer species of work, requiring more experienced and skilful workmen, and the use of copper wheels instead of wood and stone wheels, and oil and emery instead of sand.

The question referred to this court by the foregoing certificate, and the solution of that question, are supposed to lie within a comparatively narrow compass. In the construction of the act of congress of July 30, 1846, as in that of every other statute, one cardinal rule must govern, and it is this: that wherever the will or intention of the lawmaking power is declared in plain and unequivocal terms, that will or intention must be followed—absolutely fol-
[* 18] lowed. It would not be admissible * under such circum-

stances, to attempt a control or modification of that will, by speculations of policy or by facts or opinions derived *aliunde*, as such a proceeding would in effect operate a repeal of the positive law, or the abrogation of a superior power, by what were the just and regular subjects of its operation. Where a statute may be ambiguous in its language, or may have reference to facts or conclusions dependent on usage, the influence of opinion or the proof of established usage may be proper or even indispensable, in fixing the just interpretation of the law, but it is only in instances like these last mentioned, that such a rule of interpretation can be tolerated.

The question presented upon the certificate from the circuit court will be considered, first, with reference to the language of the tariff act of July 30, 1846; and next, upon the import of the facts proved in the case, upon the hypothesis that those facts could at all affect the rule of interpretation.

In schedule B, part of the act above mentioned, laying an impost of 40 per centum on all articles embraced within it, the only description of glass mentioned is that designated as "glass cut." Its distinguishing characteristic, that brings the article within the purview of that schedule is, that it be cut; the figure, or the extent in which the process of cutting should have been applied, was nowhere defined by the statute; and it must be obvious, that any attempt to define or describe that which may and must indeed be as diverse as the skill, the taste, or the prospect of profit on the part of the manufacturer, would have been utterly nugatory. But it could be easily understood, both by the lawmaker and by others, that the beauty, the quality, and the price of glass are heightened by the process of cutting, and it was equally notorious or susceptible of proof, that the process of cutting is accomplished by but one species of operation, namely, the operation of grinding. It would appear plain, then, that all glass subjected to this one known process, as being enhanced in value, was designed to fall within the description in the statute of "glass cut."

The articles of glassware enumerated in schedule C, as being subject to an impost of 30 per centum, are thus described, namely: glass tumblers plain, moulded, or pressed, "not cut or punted." Upon the language of the description just quoted, it would seem too clear for cavil, that cut or punted tumblers cannot be placed in the same class with those that are enumerated as "plain, moulded, or pressed," but are carefully contradistinguished from these last denominations. Cut or punted tumblers, therefore, even if these two terms could be understood as having different significations and were not applicable merely to different degrees of cutting or grinding,

[* 19] do not fall under the lower rate of duty—but all *cut tumblers, no matter in what part, in what figures, or to what extent they are cut, and all punted tumblers, were by the act of congress of July 30, 1846, subject to a duty of 40 per cent. upon the proper construction of the language of the statute. An effort has been made to control this language, by introducing the opinions of certain dealers in glass, and of other persons in the city of New York, to show that tumblers, the entire bottom of which are ground or smoothed by the glasscutter, and tumblers the sides of which are wrought and ornamented by the same means, are not considered as cut, but are held to be the first plain, and the second engraved tumblers. The sum of the argument thus attempted, when tested by common sense, amounts to this: That the process of grinding or cutting, when applied to the entire surface of the bottom of tumblers, or to the ornamenting of their sides, although it be the identical process and the only one by which cut glass is manufactured, is not cutting, but something less; and that the manufacturing of cut glass, means something else or beyond the only process by which cut glass is ever made. The integrity or indeed the intelligibility of this argument, this court are unable to perceive. It cannot be sustained in opposition to the language of the statute, in violation of consistency, and against the weight of the testimony in the cause, upon mere arbitrary and unfounded assumption, or upon opinion entertained within a limited theatre, and this by persons whose interests are involved in and would be advanced by that assumption. The weakness of this assumption is further exposed by recurrence to facts stated by manufacturers and found in the record, in strict conformity with which the distinction made in the statute appears to have been taken.

Thus it is proved, that tumblers are manufactured either entirely by the glassblower, or in part by the glassblower, and in part by the cutter or grinder; and that glassblowing and glasscutting are distinct and separate trades and processes of manufacture. It is further shown, in proof, that the bottoms of tumblers manufactured entirely by glassblowers, are rough in the centre, being there broken off from the punt or stick in which they are made; that after their completion as far as can be by the glassblower, they pass into the hands of the cutter or grinder, by whom the centre of the bottom is cut or smoothed, and that the process of thus cutting or smoothing the centre of the bottoms of these tumblers, is called punting. Again, it is in proof, that the tumblers, as made by the glassblower, are frequently passed to the cutter or grinder, by whom the entire surface of the bottom is cut or smoothed; and it is the tumbler, thus cut and finished by the glasscutter, that is said to be known in the

trade in * New York as "the plain tumbler," or as the [* 20] "plain smoothed-bottomed tumbler." It is also proved, that the cutting and smoothing the bottom of the tumbler is effected by the identical process which is applied in punting, the only difference consisting in the fact, that in the former operation it extends to the entire surface, instead of being limited to the point at which the tumbler was separated from the punt or stick. "Cut or punted tumblers are expressly distinguished in the statute from glass tumblers, plain, moulded, or pressed." Punted tumblers, it is clearly shown by the facts certified, are made by the operation of cutting or grinding the centre of the bottom; the smoothing of the entire bottoms of tumblers is merely the application of the same process to a greater extent; how this extended application can cause those tumblers subjected to it to be considered less as cut glass, than if they were merely punted, or cut at a small point of the bottom, presents a problem not easy of solution. Could these tumblers, with the entire bottom or sides cut or ground, be, with any propriety of language, denominated "plain tumblers," or "plain, smoothed-bottomed tumblers," they still are not the less "plain tumblers," or "plain, smoothed-bottomed tumblers," or "plain tumblers with flattened bottoms," or "engraved tumblers" so constituted by the operation of cutting or grinding. In this view of the question certified, it is the opinion of this court, that glass tumblers, having the entire surface or bottom smoothed or polished, or their sides figured or ornamented by cutting or grinding, come regularly within the operation of schedule B of the tariff act of July 30, 1846, and are within the intent and meaning of that schedule, subject to a duty of 40 per centum *ad valorem*, as glass cut; and we order it to be so certified to the circuit court of the United States, for the southern district of New York.

FRANCIS O. J. SMITH, Appellant, v. JOSEPH W. CLARK *et al.*

12 H. 21.

A cause cannot be docketed and dismissed under the 43d rule of this court upon a certificate of the clerk of the court below, which does not name every individual who was a party to the record.

Woodbury, for the motion.

TANEY, C. J., delivered the opinion of the court.

A motion has been made to docket and dismiss this case, under the 43d rule of this court.

The certificate of the clerk states, that, in the circuit court of Massachusetts, in a cause depending in that court, in which Francis O

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J. Smith was complainant in equity, and Joseph W. Clark and others were respondents, a final decree in that court was made on the 17th of October, 1850, in favor of the said Joseph W. Clark and others, respondents, from which the said Francis O. J. Smith appealed on the same day; and on the 30th of October filed his appeal-bond with sureties, whereby execution on the decree was suspended.

The certificate conforms to the rule in all respects but one, and that is in the statement of the parties. The respondents are stated to be Joseph W. Clark and others, from which, as well as from the statement in the motion, it appears that there were other respondents parties to the suit, who are not named in the certificate.

The 43d rule provides, that where the party against whom a judgment or decree is rendered, fails to file the record and docket the case within the time limited by the rule, the other party [* 22] may *docket the case and file a copy of the record with the clerk, in which case it shall stand for argument at the term; or he may, at his election, have the case docketed and dismissed upon producing a certificate from the clerk stating the cause, and certifying that such a writ of error or appeal had been duly sued out and allowed.

Now, where the unsuccessful party brings a writ of error, all the parties to it must be named in the writ; and the name of one or more of them "and others" is not a sufficient description to bring those not named before the court. It was so decided in *Deneale and others v. Stump's Executors*, 8 Pet. 526. And the same principle was applied to a writ of error docketed under the 43d rule, in the case of *Holliday et al. v. Batson et al.* 4 How. 645. And the reason for requiring all the parties, whose interests are to be affected by the judgment, to be named in the writ of error, applies with equal force to the case of an appeal from a decree.

Where the party, in proceeding under the 43d rule, elects to file the record and try the cause, the record must certainly be as full and complete as the one which would be required from the opposing party. It must name all the persons which the writ of error or appeal is intended to bring before the court; otherwise there could be no judgment or decree for or against them.

And upon the same ground, the same thing must be done when the case is docketed in order to obtain a judgment of dismissal. The proceeding is in the nature of a writ of error or appeal, in which the party, in whose favor the judgment or decree was rendered, is allowed to bring the case before this court, in order to prevent unnecessary delay. And all the parties to the judgment or decree, whose interests are to be affected by docketing and dismissing the suit, are

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regarded as in court, for the purpose of being parties to the judgment of dismissal. Nor could the circuit court regularly issue an execution for or against a person not named; as it would not appear that he had been a party to the proceeding here, or that there had been a judgment of dismissal for or against him.

The rule of which we are speaking, was framed upon this principle: It requires that the certificate of the clerk should "state the cause," and this is not done unless the parties to it are named.

A departure from the rule might lead to very loose practice, and perhaps to abuses. We think it more safe to adhere to the established practice in this respect; and have used this occasion to state it the more fully, in order that the members of the bar and the clerks of the courts may in future avoid mistake.

The motion to docket and dismiss in this case is overruled.

JOSEPH P. THREDGILL, Administrator of ARCHIBALD GOODLOE, deceased, Appellant, v. JOHN M. PINTARD.

12 H. 24.

A settler, entitled to preëmption, sold his right, his vendee resold it, taking from the second vendee a contract in writing, to pay to the preëmptioner a sum of money as part of the price for which the preëmptioner had conveyed his right to the first vendee. Upon a bill in equity by the preëmptioner, to subject the land to the payment of this sum of money, *held*, 1. That the preëmptioner had a title, which was the subject of a sale. 2. That the second vendee having gone into possession under his contract, which he never rescinded, and not having relinquished the possession, could not afterwards acquire a title from the government by proving a right of preëmption in his own name, and then insist that nothing was due on account of his purchase. 3. That the complainant had a lien on the land by virtue of the contract of the second with the first vendee.

THE case is stated in the opinion of the court

Lawrence, for the appellant.

Crittenden, (attorney-general,) *contra*.

* M'LEAN, J., delivered the opinion of the court. [* 36]

This is an appeal from the decree of the circuit court, for the district of Arkansas.

Under the act of the 12th of April, 1814,¹ Jane Mathers claimed a right of preëmption, by virtue of occupancy and cultivation, to the southeast quarter of section one, township eighteen south, range one west, containing one hundred and sixty-eight acres and ninety-six hundredths, lying south of the Arkansas River. She assigned her right to Thomas T. Tunstall, who entered and paid for the land at

¹ 3 Stats. at Large, 121.

the land-office at Little Rock, the 24th of July, 1834, and obtained a patent certificate. On the 24th of February, 1838, this [* 37] purchase was annulled by the commissioner of * the land-office, on the ground that the Indian title to the land had not been extinguished when the settlement was made. The Indian title was relinquished to the United States by the Quapaw treaty, the 24th of August, 1818.¹

This tract was purchased of Tunstall by Pintard, in the spring of 1833, who took immediate possession, and made improvements on it. In the autumn of the same year he removed his family to the land, constructed cabins, stables, and other fixtures, and in the spring of 1834, he cultivated seventy-five or eighty acres in corn and cotton.

On the 23d of March, 1835, Pintard sold the above quarter section, and a part of the southwest quarter of section six, so as to make a tract of two hundred acres, at \$40 per acre, to William Rhodes, who gave two notes of \$4,000 each, payable in one and two years, with interest at ten per cent. per annum. The two hundred acres were sold by Rhodes to Goodloe on the 3d of March, 1837, for \$65 per acre. As a part of the consideration for this purchase, Goodloe agreed to pay Pintard the amount of his claim so soon as a regular title for the premises should be obtained.

Goodloe, on the 15th of February, 1839, proved a preëmption in his own name, under the act of June 22, 1838,² to the quarter section, and paying the purchase-money into the land-office, he obtained a patent in his own name. Prior to this, on his contract with Rhodes, he paid to Pintard \$1,963.82. But having obtained the title to the land in his own name, he refused to make any further payments to Pintard on the ground that his claim was void. To enforce the payment of the sum due him on the sale to Rhodes, Pintard filed the bill now before us, with a prayer that the land might be sold, or so much of it as should be necessary to discharge the balance due to him.

It must be conceded that the first settler upon this land, the Indian title to it not having been extinguished, could claim under the act of 1814, no preëmptive right. No laws giving to settlers a right of preëmption, can be so construed as to embrace Indian lands. Such lands have always been protected from settlement and survey by penal enactments. But, it appears that the Indian claim to this land was relinquished to the United States by treaty, in 1818; after which it was embraced by all general acts giving to settlers a right of preëmption.

By the act of the 26th of May, 1824,³ preëmption rights were given

¹ 7 Stats. at Large, 176.

² 5 Ib. 251.

³ 4 Ib. 39.

north of the Arkansas River, to all who were entitled to such rights, under the act of 1814, and by the 3d section of the act of the 1st of March, 1843,¹ every settler on the public lands south of the Arkansas River was entitled to the same benefits * under [* 38] the provisions of the act of 1814, as though he had resided north of said river. By these acts a right of preëmption was given in virtue of the first settlement upon the land.

But there was another and prior act which gave to the occupant of this tract a right of preëmption. By the act of the 19th of June, 1834,² every settler upon the public lands prior to the passage of that act, who was in possession of a quarter section and cultivated a part of it in 1833, was entitled to a preëmption. In 1833, Pintard was in possession of the quarter section and cultivated a part of it, and he continued to occupy and improve it until the spring of 1835, when he sold his right to Rhodes.

By his purchase, Goodloe entered into the possession of a valuable property, and if he desired to rescind the contract it was incumbent on him to relinquish the possession of the quarter section, and claim the cancelment of the contract. He cannot avail himself of the benefit of the contract and resist a performance of it on his part.

But Pintard, when he sold to Rhodes, was entitled to the pre-emption of the quarter section. His claim was not only a valid one, but it was sold on reasonable terms, as Rhodes in two years sold the same to Goodloe at an advance of \$25 per acre. The attempt, under such circumstances, of Goodloe to avoid the payment of the consideration, by procuring the title in his own name, is fraudulent. A title thus procured would have enured to the benefit of the vendor, even if the preëmptive right had not been vested in him.

A doubt is suggested in the argument whether Goodloe, having purchased from Rhodes, can be made responsible to Pintard. In his contract of purchase, as a part of the consideration, Goodloe bound himself to pay the amount due to Pintard from Rhodes on the previous purchase. It has been held that, under such circumstances, an action at law may be maintained in the name of the person to whom payment is to be made. But this is a case in chancery, and no one has doubted, that, in equity, such a contract may be enforced.

Has Pintard a lien upon the land for the balance of the purchase-money? We think he has. Goodloe not only had notice of this claim, but he bound himself to pay it.

It is alleged that there is a mistake in the computation of the amount due, as decreed in the circuit court. If there be an error in

¹ 5 Stats. at Large, 603.

² 4 Ib. 678.

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the calculation, it is in favor of Goodloe, and of which he has no right to complain.

In their decree, the circuit court gave the defendant a credit for the money paid to Pintard, and also a loan to him of \$200, and a liberal allowance for the expense of procuring the title. A proper deduction was also made for the deficiency in the number of acres sold.

[* 39] * There appears to be no error in the decree; it is therefore affirmed, with costs.

1 B. 816.

GEORGE W. PARKS, Plaintiff in Error, v. SUMPTER TURNER and HENRY RENSHAW, trading under the commercial firm of TURNER AND RENSHAW.

12 H. 39.

The practice of the circuit court of the United States for Louisiana, as to giving reasons for a judgment and as to the form and effect of verdicts, is governed by the acts of congress and the rules of the common law, and not by the laws of the State.

The statute of jeofails (1 Stats. at Large, 91, § 32,) applies to defects in verdicts; and where this court can see from the verdict, what was the substantial finding of the jury, and that it covered what was in issue, the judgment will not be reversed by reason of any defect in the form of the verdict.

THE case is stated in the opinion of the court.

Henderson and Mayer, for the plaintiff.

Strawbridge, contra.

[* 42] * TANEY, C. J., delivered the opinion of the court.

The material facts in this case may be stated in a few words. Turner and Renshaw, the defendants in error, filed their petition in the circuit court of the United States for the eastern district of Louisiana, alleging that Parks, the plaintiff in error, was indebted to them in the sum of \$5,969.20, upon a promissory note for that sum, drawn by Parks, payable to his own order, and by him indorsed to the plaintiffs. A copy of the note is exhibited with the petition.

Parks in his answer states, that he denies all and singular the allegations in the petition except as therein afterwards admitted; and says that the said note was given without any consideration whatever, and is therefore a *nudum pactum*, and void.

Upon this issue the case was tried by a jury, who returned a verdict in the following words: "We the jury find for the plaintiff."

And upon this verdict the court gave judgment in favor of Turner and Renshaw for the sum due upon the note; and the present writ of error is brought by Parks to reverse that judgment.

Two objections are taken by the plaintiffs in error.

1. That the verdict merely finds for the plaintiffs, in the circuit court, but does not find how much was due to them; and that no judgment therefore could be lawfully entered on that verdict.

2. That the circuit court gave no reason for its judgment.

These objections have been argued altogether upon the laws of Louisiana regulating the proceedings in its courts of justice; and which, under the act of congress of 1824,¹ are supposed to be obligatory upon the circuit court of the United States.

Article 522 of the Code of Practice declares, "that the form of a general verdict consists in the foreman indorsing on the back of the petition those words: 'verdict for the plaintiff for so much, with interest,' if it has been prayed for; or verdict for defendant, according as the verdict is for plaintiff or defendant."

And the 70th article in the new constitution of Louisiana, adopted in 1845, provides that "the judges of all the courts within the State, shall as often as it may be possible so to do, in every definitive judgment, refer to the particular law in virtue of which such judgment may be rendered; and in all cases adduce the reasons on which their judgment is founded."

* It is evident, therefore, that if this case depended upon [* 43] the laws and practice of Louisiana, the judgment of the circuit court could not be maintained. Either of the objections would be fatal. And the case of Hosea's widow and heirs v. Miles, 13 Louisiana Reports, 107, is directly in point upon both grounds.

But it is difficult to apply the rules of Louisiana practice in a case where the validity of a verdict is in question. The appellate court of that State has jurisdiction of the fact as well as of the law; and in deciding upon the fact, the court is not bound by the finding of the jury in the inferior court, but may decide in opposition to the verdict, if they think it was not warranted by the testimony in the record. And when they reverse the judgment of the court below, for error in fact or in law, they at the same time give the judgment which the inferior court ought to have given.

Upon an appeal, therefore, to the supreme court of the State, for errors like those now alleged to have been committed by the circuit court of the United States, although the judgment would have been reversed, yet the state court would at the same time have given judgment in favor of the defendants in error for the full amount of their debt. They would not have been delayed in the recovery of their money by mere technical objections to the proceedings in the inferior court, nor subjected to the expense of another trial, and

¹ 4 Stats. at Large, 62.

perhaps another appeal. The case of Hosea's widow and heirs v Miles, shows the course of proceeding in the state courts. For precisely the same errors now alleged in the case before us, were committed in that case by the court below; and although the supreme court reversed the judgment, on both grounds, they at the same time gave judgment in favor of the appellee for the amount due upon the note.

Now, as to the first objection, we certainly cannot adopt in this court the practice and mode of proceeding in the appellate court of Louisiana. For a writ of error can bring up to this court nothing but questions of law. And as the whole practice of Louisiana cannot be adopted in a case of this description, is the circuit court bound to follow it? and must the validity of this verdict depend upon the rules of the common law, and the acts of congress, or upon the formula prescribed by the Louisiana code of practice? Unquestionably the force and operation of the verdict when the case is brought here, depends upon the rules of the common law. It is conclusive upon this court as to the fact found, while in Louisiana it is open to revision and reversal in the appellate court. And if the conclusive force and effect of a verdict depends upon the rules of the common

law, it would seem to follow, that what is a sufficient finding [* 44] ing by the jury to * constitute a legal verdict upon the issues joined, and to make it operate as such, must also depend upon the rules of the common law, except in so far as they may be modified by acts of congress. And while this court is bound to give effect to the verdict according to the rules of the common law, it can hardly be required to look elsewhere, in order to ascertain what finding of the jury is a verdict, and entitled to the conclusive effect which the common law gives it. And if in this case it had appeared that the verdict had been delivered orally by the foreman, and recorded by the court, and not indorsed on the back of the petition, this court could not on that account have treated the finding as a nullity, and refused to it the authority and force of a verdict.

Besides, the enforcement of the Louisiana practice in the circuit court of the United States, would place the suitors in that court in a worse condition than the suitors in the state courts, and an accidental departure from the prescribed form would be much more injurious in its consequences. We think the sufficiency of the verdict, in its form, as well as the question of its force and effect, must depend upon the rules of the common law and the statutes of the United States. And that the qualified adoption of the practice of Louisiana by the act of 1824, was not intended to carry it to the extent now contended for by the plaintiff in error.

We proceed, therefore, to consider the case upon the principles of the common law and statutes of the United States.

The answer of the plaintiff in error, by necessary implication, admits that he executed and indorsed the note. For the only defence he takes in his answer is that it was given without consideration, and was *nudum pactum*. The issue was joined upon this point only. The answer contains no other objection to the validity of the note, nor does it allege that any part of the note had been paid, nor that he had any set-off against it, and upon these pleadings and issue the jury say they find for the plaintiff. Now this verdict undoubtedly finds that the note was given upon a good consideration, although the jury do not say so in so many words; and it is equally clear, that in finding that it was given upon a valid consideration, they must necessarily have found also that the full amount specified in the note was due to the defendants in error. For there was no allegation and no evidence that any part had been paid. No one, we think, can read the pleadings and the verdict without being satisfied that this is the true meaning of the jury. There is no ambiguity or uncertainty in it. And the judgment in the circuit court is evidently according to this finding, and is therefore correct, unless there is some rule of law which renders the verdict inoperative and void.

* It is certainly the province of the jury, in a case of this [* 45] kind, not only to determine whether the plaintiff is entitled to recover, but to find also and at the same time the amount due. And, in a court acting strictly upon common law forms and modes of proceeding, no judgment could have been legally entered, because the verdict omits to specify, in express terms and in the established form, the amount which the defendants in error were entitled to recover. How far the verdict might even yet be amended in the circuit court, is another question. For although the rule was anciently very strict in not permitting amendments to verdicts, yet, in later cases, this strictness has been relaxed in order to prevent a failure of justice; and while the English courts adhered to the established forms they often prevented them from working injustice to the parties by a liberal use of the power of amendment.

Thus in the case of *Richardson v. Mellish*, 3 Bing. 334, 346, a general verdict had been rendered and damages assessed upon a declaration in which one count was good and the others bad. A judgment upon this verdict was rendered in the court of common pleas without adverting to the insufficiency of some of the counts, and the case was afterwards removed to king's bench by writ of error. As the record stood, the judgment of the court of common pleas must undoubtedly have been reversed. But while the case was pend-

ing in the king's bench, and had been argued there, and this error insisted upon as a ground for reversal, the court of common pleas amended the verdict by entering it for the plaintiffs on the good count, and for the defendant in those counts which did not show a cause of action. The court was convinced, by the notes of the judge who tried the case, that the evidence offered at the trial applied to the good count, and that there would be a failure of justice if the judgment was reversed upon this technical objection, which could and would have been readily removed if made at the trial.

We refer to this case to show that the English courts, when acting altogether upon the principles of the common law, will amend a verdict actually rendered by the jury and recorded, if the court is satisfied, from the evidence and the pleadings, that in the form in which it was given by the jury it does not accomplish what they intended, and would, on that account, fail to do justice to the party in whose favor they found.

But it is not necessary to examine further into the practice of courts acting upon the rules of the common law; nor to inquire whether the verdict in this case, if defective in form, might not yet be amended in the circuit court. For we are satisfied that [* 46] *the 32d section of the act of congress of *1789, c. 20, removes all difficulty in the case, and makes it the duty of this court to affirm the judgment rendered on this verdict.

The section of the law referred to directs the courts of the United States to proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections or defects, or want of form in the writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatever, except those only in cases of demurrer, which the party demurring shall specially sit down and express together with his demurrer as the cause thereof. This is a remedial statute, and must be construed liberally to accomplish its object. It not only enables the courts of the United States, but it enjoins it upon them as a duty, to disregard the niceties of form, which often stand in the way of justice, and to give judgment according as the right of the cause and matter in law shall appear to them. And although verdicts are not specially mentioned in this provision, yet the words "or course of proceeding whatever," are evidently broad enough to include them; and, as they are within the evil, they cannot, upon a fair interpretation of the statute, be excluded from the remedy.

The question, however, has been already decided in this court in the case of *Roach v. Hulings*, 16 Pet. 321, 322. In that case, as in the one now before the court, the verdict was defective according to

Montault v. United States. 12 H.

strict technical rules, and no judgment could legally be entered upon it. But this court held that the act of congress above mentioned was intended to remove objections of that description where they impeded the administration of justice, and that it extended to imperfections and want of form in the findings of juries, as well as to the other proceedings in the suit. And although, according to the strictness required by common-law rules, the judgment must have been reversed, the court sustained it upon the ground that the substantial meaning of the verdict was manifest, and the defects objected to cured by this act of congress. The intention of the jury in the case before us is equally clear upon the record; and, upon the principles decided in the case of *Roach v. Hulings*, equally within the protection of the act of congress. The right of the cause, and the legal obligation of the plaintiff in error to pay this money, is sufficiently apparent upon this record.

The second objection, taken by the plaintiff in error, is obviously untenable. The provision in the constitution of Louisiana, requiring the judges in the different courts to adduce the reasons upon which their judgment is founded, can, of course, have no authority in the courts of the United States unless adopted by an act of congress. And the act of 1824, adopting, to a certain *ex- [* 47] tent, the practice of the state courts, has no reference to a provision of this description. Indeed, such a provision is inconsistent with the practice and modes of proceeding in the courts of the United States. For the reasons upon which the opinion of the inferior court is founded form no part of a record when a case is brought here by writ of error. They cannot properly be inserted in a bill of exceptions. The point or principle of law, as applied to the case before the court, is all that is certified, and not the reasons upon which the court decided.

The judgment of the circuit court is, therefore, affirmed.

13 H. 212.

AUGUSTE DE MONTAULT *et al.* Appellants, v. THE UNITED STATES.

12 H. 47.

After the 10th of February, 1763, the date of the definitive treaty of peace between Great Britain, France, and Spain, by which the territory between the rivers Mississippi and Perdido was ceded to Great Britain, the French authorities could not grant lands therein.

THE case is stated in the opinion of the court.

Lawrence and Badger, for the appellants.

Crittenden, (attorney-general,) *contra*.

[*50] *TANEY, C. J., delivered the opinion of the court.

The appeal in this case was taken from the decision of the district court for the southern district of Alabama.

The appellants filed a petition in that court to establish their title to a tract of land situated south of the 31st degree of north latitude, and between the rivers Mississippi and Perdido, in the State of Alabama, the boundaries of which are set out in the petition. They state that the land in question was granted to the Chevalier Montault de Monterault on the 11th of March, 1763, by Louis Kerlerac, then governor of the colony of Louisiana, and Louis Nicholas Faucault, performing the functions of commissary ordonnateur, both of them holding their appointments under the king of France, and the petitioners claim title as the descendants and legal heirs of the grantor.

The only question which arises on this record is upon the [*51] *validity of this grant. It is objected to on account of the vagueness and uncertainty of the boundaries as set forth in the petition. But it is not necessary to express our opinion upon this point, because the other objection taken on behalf of the United States is conclusive, and it is very clear that the French authorities had no right to make this grant, and that it conveyed no title to the ancestor of the petitioners. For the definitive treaty of peace between Great Britain, France, and Spain, by which the territory in which this land is situated was ceded to Great Britain, was signed on the 10th of February, 1763, and consequently the French authorities could not, after that day, grant a title to lands lying in the ceded territory. This point was decided in the case of *The United States v. Reynes*, 9 How. 127; *Davis v. The Police Jury of Concordia*, 9 How. 280; and *The United States v. Dauterive*, 10 How. 609. And as the grant in question was not made until the 11th of March next following the date of the treaty, it was at that time the exercise of a power by the French authorities which they no longer possessed, and could convey no title to the grantee.

The decree of the district court dismissing the petition was, therefore, correct, and must be affirmed.

The Farmers' Bank of Virginia v. Groves. 12 H.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE FARMERS' BANK OF VIRGINIA, Appellants, v. HORACE H. GROVES, Administrator of MOSES GROVES, deceased.

12 H. 51.

The drawer of bills, who was the principal debtor, for the purpose of relieving the accommodation acceptor, made a contract with the indorsee to satisfy the bills, and this agreement was executed on the part of the drawer while the bills were out of the hands of the indorsee, who had transferred them to the appellants, as security for his indebtedness to them; subsequently, the indorsee obtained the title to the bills; *held*, that as soon as he did so they were extinguished by force of the satisfaction previously given and received. A contract to exchange securities, followed by an actual exchange, cannot be rescinded by one party without a tender of what he received.

THE case is stated in the opinion of the court.

Mr Farland, for the appellants.

Johnson, contra.

* NELSON, J., delivered the opinion of the court. [* 54]

This case comes up on an appeal from a decree of the circuit court of the United States for the district of Louisiana.

The case is somewhat complicated and confused, and it will be necessary to state the material facts to be found in it in order to present clearly the legal questions involved, and upon which the decision must depend.

On the 13th March, 1837, Thompson L. King drew two drafts, amounting, in the aggregate, to fifteen thousand four hundred and ninety-seven dollars, in favor of John E. Hunter, upon Moses Groves, who duly accepted the same. The liability of Groves upon these drafts to the bank constitutes the main point in the controversy. The drafts were subsequently, but before maturity, indorsed by Hunter to Lewis A. Collier, and by him passed to the Farmers' Bank of Virginia, the appellants, as collateral security for an indebtedness to the bank. Groves was an accommodation acceptor for the benefit of King, the drawer.

The bank recovered judgment against Groves for the amount of the drafts in the Madison district court of Louisiana, December 1, 1840, and which was recorded in the office of the parish judge on the same day, in the parish of Madison, where the defendant resided, so as to operate as a judicial mortgage on his real estate and slaves. The bank recovered judgment also against King, the drawer, on one of the drafts; and, at the same time, held other judgments and demands against him, in which Collier was interested, to the amount

of some fifteen thousand dollars. These judgments and demands had been pledged to the bank by Collier as collateral security for his indebtedness.

On the 26th February, 1841, a written agreement was entered into between Collier and King, in which, after reciting the several judgments and demands above stated, and held by the bank against King, and in which Collier was interested; and also reciting [* 55] * and describing certain plantations and lands, belonging to the said King, containing in all about twenty-two hundred acres, and a large number of slaves on the same, it was agreed, among other things, that if the said Collier should be permitted to purchase the said property at sheriff's sale on any of the aforementioned judgments for his own account, or for the account of the bank, at a sum not exceeding the whole amount of the several judgments and demands, or for a less sum, that then, and in that case, the said property should be received by him in satisfaction and discharge of the same; and the evidences of the several debts and demands thus held by him and the bank should be delivered up to the persons entitled to the same; and full discharges given; and especially to Moses Groves for and on account of the judgment obtained by the Farmers' Bank of Virginia against him.

There are several other provisions and stipulations in said agreement; but, as they have no necessary bearing upon the material questions in the case, it is unimportant to notice them. Groves was a witness to this agreement.

In pursuance of this arrangement, Collier became the purchaser of the property on the 13th of March, 1841, for the sum of \$32,515, and received a deed of the same from the sheriff on the sixteenth of the month thereafter.

On the 1st of December, 1841, the Farmers' Bank of Virginia proposed to Collier, through their authorized agent, an arrangement of his indebtedness to them, as follows:—

1. The bank to give him a credit on the same of one, two, and three years.
2. And surrender all the collateral securities which they had received from him. And Collier, on his part, 1. To pay all the expenses of prosecuting the collateral securities to the attorneys in whose hands they are.
2. To give a mortgage, which was to operate as a judicial mortgage in favor of the bank, on all the property which he held in Concordia parish.
3. To assign to the bank certain notes, as collateral security, which he held against Dix and Glascock, amounting to \$9,000.
4. To have all the mortgages that appear as incumbrances upon the property reduced by a discharge of record to an amount not exceeding thirty-five thousand dollars, besides those

in favor of the Bank of Virginia, and Lancaster, Denby, and Company. And, 5. To give three notes to the bank, one for \$11,764.68, payable in twelve months after date, one for \$12,470.57, payable two years after date, and one for \$13,218.80, payable three years after date, amounting, in the aggregate, to \$37,454.05.

This is the substance of the proposition made by the agent, and which was intended as instructions to F. H. Farrar, his attorney, under whose direction the mortgage was to be [* 56] prepared and executed.

On the 3d of December, 1841, the mortgage was duly executed by Collier, and delivered to Farrar, and accepted by him on behalf of the bank.

It was recorded in the proper office, and a copy with the three notes transmitted by mail to the bank agreeably to the instructions.

On the 20th of April, 1843, the Farmers' Bank of Virginia applied to the judge of the circuit court of the United States, in the district of Louisiana, for an executor's process against the estate of Groves, he having died in December, 1841, praying that so much of his estate might be seized and sold as should be necessary to satisfy the judgment, which had been obtained by the bank against him December 1, 1840, and which we have already referred to; and an order was granted accordingly; whereupon, Horace H. Groves, the son of the deceased, and administrator of the estate, filed the bill in this case in the circuit court of the United States, setting out, substantially, the facts already recited, and praying that the bank may be enjoined from proceeding to seize and sell any part of the estate, that the executory process may be set aside, and the bank decreed to enter satisfaction of the judgment of record.

The answer of the bank denies the authority of Collier to act for them in any settlement or discharge of the judgment, or for any purpose in connection therewith. They also deny that they ever gave their assent to the alleged discharge of the debt for which the judgment was rendered, or ever ratified or confirmed the acts and doings of Collier in relation thereto.

They further allege, that Collier was indebted to them in the year 1837, in a large amount, and that he transferred to them the acceptances of Groves, mentioned in the bill, as far back as 1837 and before they reached maturity, as collateral security for his indebtedness. That they never intended to place the bills under the control of Collier, but held them as their own, and prosecuted them to judgment. Nor did they ever allow him to take the charge and management of the judgment as their agent after it was recovered.

They further allege, that being delayed in the collection of the col

lateral securities, and receiving no payments from Collier, they employed James W. Pegram, in November, 1841, as their agent, to call upon Collier, at his home, with instructions to obtain a more satisfactory arrangement of the debt against him. That it resulted in the extension of the time of payment on his giving the mortgage and notes referred to in the bill. They admit it was understood [* 57] between their agent and Collier, that * the negotiable paper which had been transferred as collateral security was to be surrendered up to him, the security furnished by the mortgage being, as represented by him, sufficient to secure his indebtedness, and relying on his punctuality in the payment of the notes as they became due. That two of the notes provided for by the mortgage are already past due, and nothing paid by the said Collier; that the property covered by the mortgage is discovered to be liable under previous incumbrances to a large amount, which may render it insufficient for the payment of their debt. That said Collier has long since waived the assignment of the said judgment, and consented that the bank might retain it as additional security.

The court below granted a preliminary injunction, and afterwards at the hearing on the pleadings and proofs, confirmed the same, and decreed, that satisfaction of the judgment against Groves should be entered of record.

Upon full consideration we are of opinion this decree is right, and should be affirmed.

King, the drawer of the bills, was the principal debtor, as the acceptance by Groves was for his accommodation. He was therefore bound to provide for them and keep Groves harmless; and this he did, so far as the interest of Collier was concerned, by the agreement of 26th February, 1841, and subsequent purchase by Collier of the plantation and slaves in pursuance of its stipulations. The purchase and title of the property under the sheriff's sale, it was agreed, should be made, and taken in satisfaction of this among other demands against King; and in order to complete the satisfaction, Collier bound himself to procure a discharge of the judgment which the bank had recovered upon the drafts, and then held. Groves was privy, and consenting to this arrangement between King and Collier, and, as between the latter and him, when consummated, it constituted a valid defence to the drafts or judgment either in law or equity.

It is true, as the bank was not privy and consenting to the arrangement, their interest in the drafts was unaffected by it, and they were still at liberty to enforce their judgment against Groves, if necessary to the payment of the debt for which the drafts had been pledged as security.

But, on the 3d of December following, they entered into an arrangement with Collier by which it was agreed that, on the execution and delivery to them of three notes, payable in one, two, and three years, covering the whole amount of his indebtedness to the bank, together with a mortgage upon a large plantation and slaves, besides other real estate, as security for the payment, all the collateral securities previously held for the indebtedness should be given up to him. The notes and mortgage were executed and delivered [* 58] accordingly, and the collateral securities surrendered, and the interest in them again exclusively vested in Collier; and in this way becoming the owner of the drafts and judgment against Groves, for which he had already received satisfaction, and bound himself to procure a discharge from the bank, the agreement with King, the principal debtor, operated instantly as an extinguishment of the demand; and placed it beyond the power of either Collier or the bank, or both of them together, to revive it by any subsequent arrangement. The defence of Groves, arising out of the agreement of King with Collier, attached immediately on the bank reinvesting Collier with their interest in the drafts, and would adhere to them into whosoever hands they might pass. They were not only bills over due, but had become merged in judgment against Groves.

It has been argued, on behalf of the bank, that Collier failed to comply with all the conditions upon which they stipulated to accept the mortgage and surrender the previous collateral securities; and especially in one important particular, namely, the discharge of record of existing incumbrances upon the property so as to reduce them to an amount not exceeding \$35,000.

But there are several answers to this objection.

In the first place, the weight of the proof is, that the agent, after an investigation and examination of these incumbrances, waived the discharge of record, being satisfied that they had been paid from the representation of Collier.

And in the second, no such ground of defence is set up in the answer, nor is there any allegation of imposition or fraud by Collier in the transaction. And, in the third, assuming that there was, the bank could not avail themselves of it for the purpose of avoiding their part of the arrangement, and, at the same time, hold on to the mortgage as a security for Collier's indebtedness. There has been no surrender of the mortgage, on the part of the bank, or offer to surrender and vacate the agreement. On the contrary, it is claimed by them as an available security, held and relied on against Collier.

It may be, that if a fraud had been committed upon the bank, in the negotiation to substitute this mortgage for other collateral securi-

ties, upon a surrender of the mortgage and notes accompanying it to Collier, on a discovery of the fraud, claiming to vacate the arrangement on this ground, their right to and interest in the securities surrendered, in the absence of any prejudice to the rights of third persons acquired, in the mean time, might revive; and, in this way, the defence of Groves be overreached, the bank being thus remitted to their original rights. But, be this as it may, as no such step has been taken, nor even claim of fraud set up in the pleadings, [* 59] we are bound to regard the *arrangement as valid and binding upon both parties; and if any fraud or imposition has been committed to the prejudice of the bank, they must look to him personally for compensation and redress. The rights acquired by each party to the securities exchanged, must be taken to be such as were intended by the terms of agreement; and, regarding the transaction in this light, it is clear, even conceding, as is alleged, that Collier has since waived the surrender of the collateral securities for which he had stipulated, or has since reassigned them to the bank, the defence of Groves is still complete. These drafts, and judgment upon them, became extinguished the moment the agreement between the bank and Collier was carried into execution. They then became the exclusive property of the latter, in which event his agreement with King, the principal debtor, worked an immediate satisfaction.

It has, also, been argued, that King has failed to fulfil all the stipulations in his agreement with Collier, and hence that it is not available to Groves. But this is a question exclusively between him and Collier, who, for aught that appears, is content with the agreement in the way it has been carried into execution. He purchased the property and took the sheriff's deed as is alleged, and not denied, went into the possession and enjoyment of the estate, and still holds it. And, if he has not acquired all the property stipulated for in his agreement, he must look to King, personally, for compensation and redress. He has chosen to accept the execution of the agreement, and must be deemed bound by its stipulations.

In every view we have been able to take of the case, we are of opinion the decree of the court below is right, and should be affirmed.

GODFREY LESSIEUR, ABRAM AUGUSTINE and MARY W., his Wife, THOMAS H. DAWSON, RICHARD J. WATSON and SARAH, his Wife, and PALMELIA E. DAWSON, LAURA A. DAWSON and GEORGE W. DAWSON, Infants, by THOMAS H. DAWSON, their Guardian, Plaintiffs in Error, v. THOMAS PRICE.

12 H. 59.

If the judgment of an inferior court of a State, against a title claimed under an act of congress, is affirmed by a divided court above, a writ of error lies, under the 25th section of the judiciary act of 1789, (1 Stats. at Large, 85.)

The inception of title to a particular tract of land under a New Madrid certificate, is the recording of the plat and survey in the recorder's office.

By the act of March 3, 1820, (3 Stats. at Large, 547, § 6,) granting four sections of land to the State of Missouri, a title to four sections of land was vested in the State, with power to select and locate the particular land; and when the selection was made by authorized commissioners and notified to the surveyor-general, the title became attached to the particular land so selected.

The surrounding circumstances considered, and allowed to give a construction to an act of congress making a grant of land.

A location under a New Madrid certificate amounted to an exchange of the land at New Madrid for the land located, and could not be made without the knowledge of the owner of the New Madrid claim.

THE material facts appear in the opinion of the court.

Glover, for the plaintiffs.

Leslie, contra.

* CATRON, J., delivered the opinion of the court. [* 72]

The first consideration arising in this case involves a matter of practice. The suit was brought in a state circuit court of Missouri, and tried by the court without the intervention of a jury; when the judge ruled questions of law propounded to him unfavorable to the plaintiffs, and gave judgment for the defendant, to reverse which, a writ of error was prosecuted, and the cause removed to the supreme court of that State. On a rehearing there, only two of the judges were competent to preside; they disagreed in opinion, and a judgment of affirmance was entered because of that division. And the question here is, how we are to treat the points ruled in the circuit court.

Our conclusion is, that the rulings of the circuit judge were adopted and affirmed by the judgment rendered in the supreme court, in like manner that they would have been had both judges concurred in affirming the judgment on all the grounds assumed by the court below: to hold otherwise, would be declaring that nothing had been decided in the state court of last resort, and thereby a second writ of error to this court would be defeated.

[*73] *Both sides claim title under acts of congress ; on a construction of these, and the facts calling for construction, the controversy throughout depends, and therefore, this court has unrestricted power to adjudge and conclude the controversy.

Plaintiffs claim title under a New Madrid certificate; and the defendant under an act of congress, granting to the State of Missouri a tract of four sections, to the end of locating the seat of government on it; and the principal question presented by the record is, which party first acquired such an interest in the land as will, by the laws of Missouri, support an action of ejectment. The state law provides that those claiming lands by " New Madrid locations," may maintain actions of ejectment therefor. The location must, of course, be an appropriation of the land, and its acquisition by the locator, with the corresponding right to possess and enjoy it, as against the United States; and the inquiry arises, what acts were required on the part of the locator to divest the United States of title? This depends on a true construction of the act of February 17, 1815,¹ for the relief of the inhabitants of New Madrid county, who suffered by earthquakes. John Baptiste Delisle was one of the sufferers, and on November 20, 1817, a location certificate for two hundred arpens was obtained from the recorder of land-titles, authorizing Delisle to locate that quantity on any of the public lands within Missouri territory, the sale of which was authorized by law.

The act declares that such certificate having issued, the location shall be made on application of the claimant by the principal deputy-surveyor for said territory, or under his direction, whose duty it shall be to cause a survey thereof to be made, and return a plat of the survey to the recorder of land-titles, together with a notice in writing, designating the tract or tracts thus located, and the name of the claimant on whose behalf the same shall be made, which notice and plat, said recorder shall cause to be recorded in his office. That it shall be the duty of the recorder to transmit a report of claims allowed, and locations made, under this act to the commissioner of the general land-office; and he shall deliver to the party a certificate, stating the circumstances of the case, and that he is entitled to a patent, and on which a patent shall issue, &c.

The surveyor was required to make the location, and survey, " on application of the claimant." On this requirement, a practice naturally sprung up of filing with the surveyor a notice of location, describing the land that the claimant desired should be surveyed for him, and with which request the surveyor complied, unless some

¹ 1 Stat. at Large, 211.

valid objection stood in the way, and rendered a compliance improper.

•The notice of location, in this instance, was delivered [*74] to the surveyor-general June 2, 1821, for the land in dispute, and is claimed as the inception of title and location in fact, within the meaning of the state law, authorizing ejectments on New Madrid locations. That it was the mere act of the party, not having the assent of government, must be admitted. The act of congress provides, "that, in every case where such location shall be made, according to the provisions of this act, the title of the person or persons to the land injured as aforesaid shall revert to, and become absolutely vested in the United States. A concurrent vestiture of title must have occurred. The injured land must have vested in the United States at the same time that title was taken by the new location. It was intended to be an exchange between the parties, and the inquiry arises, when did the United States take title? Was it when application in writing was made by the claimant to the surveyor to have his land located and surveyed at a particular place? The warrant, or location certificate, issued from the recorder's office, and there it was returnable; there the plat and certificate were returned and recorded; that officer issued the patent certificate; in that office the law required all official business to be transacted, and not in the surveyor's office. That the notice of location, and plat and certificate were recorded in the surveyor's office is true, and it was proper. It was not done, however, to the end of furnishing evidence of title to the claimant, but to have evidence there to show that the land was appropriated according to the New Madrid act, and for the convenience of the surveyor's department. The plain meaning of the law is as above stated, nor can its import be changed by the practice pursued in the surveyor's office; there the claimant could not go for record evidence of his location, binding the United States to an exchange of lands. He could only refer to the recorder's office. And what was the character of the evidence he had to rely on there? His entry was to be made by the principal surveyor, or under his direction. It was to consist of a plat of survey, and a certificate describing the land, with the name of the claimant for whom the location by survey was made. This return the recorder had to examine, pass upon, and record; if the location and survey had been properly made, then the United States assented to the exchange, and not until then.

The danger of allowing a claimant to locate a floating warrant at his own discretion, threatened the country with evils that had afflicted some of the elder States. It would have been certain to produce

conflict of claims for the same land, to a material extent, and been contrary to a settled policy of the United States in disposing of the public lands, which was to avoid such conflict; and, [*75] *therefore, the act of 1815 vested the power of locating the claim in the principal surveyor of the territory.

We expressed our opinion as to what was a location of a New Madrid claim in the case of *Bagnell v. Broderick*, 13 Pet. 436, thirteen years ago; and did so again in *Barry v. Gamble*, 3 How. 51, in 1845, nor would we have said any thing further on the subject but for the division of opinion in the supreme court of Missouri, which seems to call in question the opinion expressed in the cases referred to, as we understand the proceeding there, on the ground that such expression of opinion was not necessary to arrive at the decisions then made.

A second question on the merits arises on the defendant's title, and is so connected with the one just discussed, that the principles governing it must be settled before a legal conclusion can be arrived at which will govern the controversy.

On the 6th of March, 1820, congress provided by law for the admission of the then Missouri territory as a State of the Union, and among numerous other regulations to aid the new State on coming in, it was enacted, "that four entire sections of land be, and the same are hereby granted to the said State, for the purpose of fixing the seat of government thereon; which said sections shall, under the direction of the legislature of said State, be located, as near as may be, in one body, at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States; provided that such locations shall be made prior to the public sale of the lands of the United States surrounding such location."

To secure the benefits of this donation, the following steps were taken by the State of Missouri:—

1. An ordinance adopted by the convention convened to form a constitution on the 19th of July, accepting the grant of land.

2. An act of the legislature of the State providing for the location of the permanent seat of government, approved 16th November, 1820. This act appoints commissioners to settle a site for the permanent seat of government, and requires them to make their report at the next session of the general assembly of said State.

3. An act supplementary to the foregoing act, approved 28th June, 1821. This act further extends the time of making their report until the next session.

4. A joint resolution, also approved 28th June, 1821, requiring the

governor of the State to notify the surveyor-general for the States of Illinois and Missouri, and also the register of the land-office in which the lands are selected, that the commissioners appointed for that purpose "have selected the fractional sections six, seven, and eight, the entire sections seventeen and eighteen, *and so [*76] much of the north part of sections nineteen and twenty as will make four sections in fractional township forty-four south of the Missouri River, in range No. 11 west, fifth principal meridian; and that he request the said surveyor and register to withhold the same from sale or location, until the general assembly determine whether said selection be accepted by said State."

5. An act of the general assembly, entitled "an act fixing the permanent seat of government," approved 31st December, 1821, the first section of which accepts the land above described for the use and benefit of said State. The second section provides for the laying out of a town thereon, and the third section requires the governor to notify the surveyor-general of the acceptance of said land by the general assembly, for the permanent seat of government, by transmitting to him an authenticated copy of said act.

6. Also an act of the general assembly, entitled: "An act supplementary to the act fixing the permanent seat of government," approved 11th January, 1822. This act provides for the laying out of a town on the land selected, authorizes the sale of the lots in said town, and prescribes the terms of said sale, and requires the commissioners to make a report of their acts in this respect to the next general assembly. It further provides that "any proposals made by any person or persons having claim to any part of the said land, selected for the permanent seat of government, in order that any claim or claims may be adjusted, shall by said commissioners be communicated to the general assembly."

These proceedings took place before the surrounding lands were offered at public sale.

First, it is insisted "that the location was void because there never was any communication made by any person for the State of Missouri to any officer of the United States having power to grant an application for, or allow any location of said lands; and that such location should have been entered and recorded in the register's office of the local land district."

The land was granted, by the act of 1820; it was a present grant, wanting identity to make it perfect; and the legislature was vested with full power to select and locate the land; and we need only here say what was substantially said by this court, in the case of *Rutherford v. Green's Heirs*, 2 Wheat. 196, that the act of 1820 vested a

title in the State of Missouri, of four sections; and that the selection made by the state legislature pursuant to the act of congress, and the notice given of such location to the surveyor-general, and the register of the local district where the land lay, gave [*77] precision to the title, and * attached to it the land selected.

The United States assented to this mode of proceeding, nor can an individual call it in question.

It is insisted, in the next place, that the location was void, because fractional sections were selected, to make the quantity of 2,560 acres, embraced by the grant; that the law granted entire sections, in a square form, and intended to exclude fractional parts of sections; and as this controversy involved a fraction, no title was taken by the State of Missouri.

This objection is plausible, but we think unsound. The whole quantity was to be selected in one body as near as might be; the object of the grant was a city site for a great political purpose; that the seat of government would be established on the Missouri River, was almost certain, a fact that could not have been overlooked by congress. To a metropolis, the river front was absolutely necessary. If the land was selected adjoining the river, fractions must of necessity be taken; and, therefore, the act of congress cannot be construed in the restricted sense contended for without violating a leading object of grantor and grantee; nor does it seem to have entered the mind of either, that a selection of fractions violated the terms of the grant. From first to last, for nearly thirty years, has the grantor acquiesced; nor do we think that the validity of the selection can be called in question by an objection never set up by the United States.

The next inquiry is as to the date when the land selected attached to the grant. June 28, 1821, the governor of Missouri notified the surveyor-general of the fact that the land had been located by the commissioners, and awaited the action of the legislature; and, on the 31st day of December, 1821, the land was accepted by the legislature; the same act provides for laying off a town and the establishment of the seat of government thereon. And as the commissioners had power to locate, and did so, subject only to legislative sanction of their report, and that report was sanctioned, our opinion is that the acts were concurrent, and that the title refers to the first act; and, therefore, that the State took title from the 28th of June, 1821, when the surveyor-general was notified that the location had been made. We state this as matter of principle, held in the case of *Landes v. Brant*, 10 How. 348, decided at last term. It is not material, however, whether the date be the 28th of June, or 31st of December,

1821, when the legislature acted. Delisle's location by survey was filed and recorded, in the recorder's office, February 11, 1822; this is the first evidence of its legal existence appearing of record, and on that day it took date. It follows that the legal title of Missouri is elder than the equitable title set up under Delisle's claim. This was in effect the opinion of the court below, as appears by a refusal to give the 4th, 5th, 6th, 7th, 8th, *9th, 10th, 11th, [* 78] and 12th exposition of the law demanded by the plaintiffs; and with which opinion we concur.

The next question raised and decided by the state courts appears by the following exposition of the law, pronounced at the request of the defendant, and on which the judgment also proceeded:—

"If John B. Delisle, who was the owner of the land in the county of New Madrid, in lieu of which the certificate No. 347 was issued, until the year 1842, knew nothing of the issuing or existence of said certificate, nor of notice, survey, or patent given in evidence by the plaintiffs, and never assented to the same prior to that date; and if, prior to that date, the four sections of land mentioned in the fourth proposition of the sixth section of the act of congress, approved March 6, 1820, had been located under the direction of the legislature of this State upon the premises in question, then no title passed to the said Delisle, in or to said premises, as against the State of Missouri."

The evidence shows that all the steps taken for the purpose of obtaining a grant of land from the United States, in lieu of land owned by John B. Delisle, lying in New Madrid county, and which had been injured by earthquakes, were taken by Langham and Hempstead, or at their instance, they representing themselves to be the legal representatives of Delisle, and without the consent, knowledge, or authority of Delisle, and that what was done by them in his name did not receive his sanction or assent until the year 1842. But it is insisted that the law will imply his assent, as the grant was beneficial to him. This might be a safe implication if the grant had been a pure donation unaccompanied with any condition; but such is not the fact. The act of congress for the relief of the inhabitants of New Madrid county, whose lands had been materially injured by earthquakes, provides that, where locations are made under the act, the title of the individual to the land injured shall revert to, and become absolutely vested in the United States. Instead, therefore, of its being a pure donation on the part of the government, it was a proffered barter or exchange of lands by legislative enactment. Where the value of the land in New Madrid had been entirely destroyed, it might be regarded as a donation of other land to the individual

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owner; but where that was not the case, it could not be so considered. Now, it is a well-known fact that much of the land exchanged with the government under this law, is this day of more intrinsic value than the land located in lieu thereof. Where this is the case, the government, instead of making a donation, has driven a profitable bargain. But the government is not chargeable with [* 79] any * wrong in this transaction, because the owners of land in New Madrid were not compelled to accept the provisions of the act; if they did so, it was a voluntary act on their part, and their assent should be evidenced by some affirmative act done by them.

There is, however, in this case no ground for implication. All presumption of assent is utterly excluded by the evidence of Delisle himself, who states that he was wholly ignorant of the existence of the act of congress on that subject until the year 1842. He could not be divested of his land in New Madrid until he assented to the exchange, and he could give no assent until he was informed of the act of congress making provision for those whose land had been injured. The title, then, to the land in New Madrid remained in Delisle up to the year 1842, when he assented to what had been done by Langham and Hempstead in his name; and, as congress only intended to grant other land on condition that the title to the land injured should revert to, and vest in the government, no title could pass to Delisle until 1842, prior to which time the State of Missouri had acquired title to the land in controversy.

It is proper to remark that, on the last ground of defence, we have adopted the views, in part, expressed by one of the judges of the supreme court of Missouri, whose opinion is found in the record.

Our conclusion is, that, on both grounds of defence, the state courts expounded the law applicable to the facts, correctly, and that therefore the judgment should be affirmed.

17 H. 542; 22 H. 144; 1 B. 358; 6 Wal. 142.

JOHN L. HARRIS, surviving Partner of ROWAN AND HARRIS, v. HIRAM G. RUNNELS.

12 H. 79.

The statute of Mississippi, of June, 1822, respecting the sale of slaves brought into that State, does not make void a note given for the price of such slaves.

ERROR to the circuit court of the United States for the southern district of Mississippi. The case is stated in the opinion of the court.

Nelson, for the plaintiff.

Howard, contra.

* WAYNE, J., delivered the opinion of the court. [* 83]

It is said that the note sued upon in this case, was given for an illegal consideration.

The illegality alleged is, that the plaintiff brought slaves into the State of Mississippi as merchandise, in contravention of the statute regulating the importation of them, and sold them to the defendant, for which the note was given in payment. It is admitted by the plaintiff's demurrer to the defendant's special plea, that they were so brought and sold. The court overruled the demurrer and gave judgment for the defendant. The cause is before this court upon a writ of error sued out by the plaintiff. The law making contracts, in contravention of statutes, irrecoverable by suit, will be first stated and afterwards applied to this case.

There is no doubt that *assumpsit* cannot be sustained upon a contract which has not a sufficient consideration. It must not be illegal, of an immoral tendency, or contrary to sound policy. The common law maxims are *ex turpi causâ, non oritur actio* — *ex dolo malo non oritur actio*. It prohibits every thing which is unjust or *contra bonos mores*. The object of all law is to repress vice and to promote the general welfare of society; and it does not give its assistance to a person to enforce a demand, originating in his breach or violation of its principles and enactments. Contracts in violation of statutes are void; and they are so, whether the consideration to be performed or the act to be done be a violation of the statute.

A statute may either expressly prohibit or enjoin an act, or it may impliedly prohibit or enjoin it, by affixing a penalty to the performance or omission thereof. It makes no difference, whether the prohibition be expressed or implied. In either case, a contract, in violation of its provisions, is void. The rule is certain and plain. The practice under it has been otherwise. The decisions in the English courts have been fluctuating and counteracting. Those in the courts of our States have followed them without much discrimination. No one can read any one of the recent elementary treatises upon contracts without noticing the differences of opinion among judges as to the operation of the rule. Showing, however, as they do, the history of these differences, they may lead to more conformity of judicial opinion hereafter in this respect.

The character of these differences will be seen by noticing one of them. Others might easily be made.

Within a few years we were told, in the English Reports, and seemingly to us with a good reason, that the rule which avoids a contract made in contravention of a statute, did not apply to statutes made for the protection of the revenue only. That the non-
[* 84] observance of excise regulations will not avoid a contract * in respect of their subject-matter, if it be not accompanied with fraud, although a penalty attaches. *Johnson v. Hudson*, 11 East, 180; *Brown v. Duncan*, 10 Barn. & Cress. 98; *Hodgson v. Temple*, 5 Taunt. 181. And that it was always to be applied, when the statute was made for the protection of the public from moral evils, or from those which we know from experience that society must be guarded from by preventive legislation. Such was received as the law by the courts in England and in our States, and cases were ruled in both accordingly; but afterwards, with only a few years intervening, Baron Parke, a distinguished judge, truly said, in *Cope v. Rowland*, 2 Mee. & W. 157: "Notwithstanding some dicta apparently to the contrary, if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which has made it so, has in view the protection of the revenue or any other object." Such we believe to be now the rule in England, but with many exceptions, made upon distinctions very difficult to be understood consistently with the rule; so much so, that we have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. In this way, the principle of the rule is admitted, without at all lessening its force, though its absolute and unconditional application to every case is denied. It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.

It is not necessary, however, that the reverse of that should be expressed in terms to exempt a contract from the rule. The exemption

may be inferred from those rules of interpretation, to which, from the nature of legislation, all of it is liable when subjected to judicial scrutiny. That legislators do not think the rule one of universal obligation, or that, upon grounds of public policy, it should always be applied, is very certain. For, in some statutes, it is said in terms that such contracts are void; in * others, that they [* 85] are not so. In one statute, there is no prohibition expressed, and only a penalty; in another, there is prohibition and penalty, in some of which, contracts in violation of them are void or not, according to the subject-matter and object of the statute; and there are other statutes in which there are penalties and prohibitions, in which contracts made in contravention of them will not be void, unless one of the parties to them practises a fraud upon the ignorance of the other. It must be obvious, from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined, before courts should refuse to give aid to enforce contracts which are said to be in contravention of them.

We now turn to the case on hand, to apply to it our version of the rule and the manner of its application.

The statute relied upon by the defendant, to avoid the payment of his note, is that of June, 1822, Hutch. Dig. 512. He relies upon the fourth section, substantially recited in his special pleas, and says the plaintiff cannot recover upon the note, as it was given for an illegal consideration, from the plaintiff's having failed, before he sold the negroes, to comply with the directions in the fourth section. The sixth section declares that both the seller and the buyer of such slaves shall pay one hundred dollars for every slave so sold or purchased. The two sections, considered conjunctively, seem to us to imply that the penalty only, without any other loss to either the seller or the buyer, was to be inflicted. The subject-matter and the sufficiency of the penalty relatively to the value of a slave, to prevent the mischief against which the legislature meant to guard, imply that the legislature did not mean that such a contract should not be enforced in a court of justice. Besides, as the act was meant to prevent convict negroes from being brought into the State for sale, and another penalty for that offence is to be inflicted, severer than that of the sixth section, without a forfeiture of the slave or any provision for his removal from the State, it cannot have been intended that the disregard of precautionary directions, for the importation of slaves for sale was to be visited with its penalty, and the indirect forfeiture by the seller of the price of them, by denying to him the aid of courts to enforce a contract of sale for negroes who were not convicts. This statute

must be interpreted as all other statutes are liable to be. The State's policy was to exclude all negroes tainted with crime. For aught that appears in the pleadings, the defendant bargained for the negroes, knowing that they were brought into the State as he says they were. If, then, there was a violation of the law by his purchase, he stands in *pari delicto* with the seller, with this difference between [* 86] * them, that he is now seeking to add to his breach of the law the injustice of retaining the negroes without paying for them. And he might do so if the statute was such as it is represented to be in his pleas. The law will not aid either of two parties who are in *pari delicto* in the violation of a statute. Whatever may be stated in a contract for an illegal purpose, a defendant, against whom it is sought to be enforced, may, to prevent it, show both the turpitude of himself and the plaintiff. Lord Mansfield said, with a very proper sensibility of the injustice of such a plea, and of the policy which permits it to be insisted upon : " The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff." Such is the law, and the defendant would have the advantage if he had not mistaken the statute under which it is claimed.

It is a rule, if effects and consequences shall result from an interpretation of a statute contrary and in opposition to the policy which it discloses, or substantially avoiding the infliction of a penalty upon the transgressor, that such an interpretation must be rejected. In this case, the interpretation contended for in behalf of the defendant does both. One of them has already been stated. It is, that it would lead to the infliction of a severer penalty for the disregard of the directions for buying slaves for sale who are not convicts, than the statute imposes upon those who shall bring convict slaves into the State.

Further, the penalty in the sixth section, upon such as do not comply with the directions in the fourth, is to be equally inflicted upon the buyer and the seller.

Make, then, this contract void, by the application of the rule *pari delicto potior conditio est defendantis et possidentis*, and the defendant, in the event of his conviction for transgressing the statute, would be substantially released from the penalty as to all the objects for which punishment is ever inflicted; because, having the power to retain the negroes, he would pay the fine from their labor, or would get them for only so much less than he bargained to give for them.

In other words, the seller, if convicted too, would pay his own and the buyer's fine. Again, as the rule is not allowed for the benefit of either party to an illegal contract, but altogether upon grounds of public policy, we do not think that public policy calls for the application of it in this case, as the defendant might keep the slaves which he bought from the plaintiff within the State of Mississippi, contrary to the law which forbade the sale of them.

* Such decided advantages, to one of two who have vio- [* 87]
lated a statute by a contract, could not have been meant by
the legislature of Mississippi.

It is gratifying to us, that the conclusion at which we have arrived is sustained by the subsequent legislation of Mississippi. In 1837, (Hutch. Dig. 535,) an act was passed repealing the act permitting slaves to be brought into the State for sale. In addition to the penalty, it is declared in terms that all contracts in contravention of it shall be void. There could not be, from statutes *in pari materia*, especially in one repealing another and substituting new conditions and penalties upon the same subject-matter of both, a stronger circumstance to show, that under the first statute in order, contracts in violation of it were not meant to be irrecoverable by suit. Our judgment in this case is, that the contract is not void, and that the defendant can take nothing by his pleas.

We are aware, that decisions have been made in the courts of Mississippi seemingly in conflict with this; but they are only so in appearance. None of them were made until after the constitution of Mississippi of 1817 had been superseded by that of 1832. We have said, more than once, and now say again, that the clause in the constitution of 1832, prohibiting the introduction of slaves into the State as merchandise, was inoperative to prevent it until the legislature acted upon it. We have read all that has been officially written in opposition to that conclusion without having our confidence in its correctness at all shaken.

We shall direct the reversal of the judgment in this case.

M'Lean, J., and Curtis, J., dissented.

THE UNITED STATES, Plaintiffs in Error, v. DANIEL H. BROMLEY.

12 H. 88.

A paper, folded in the form of a letter not sealed, containing an order for merchandise, is "mailable matter," within the meaning of the tenth section of the act of March 3, 1845, (5 Stats. at Large, 736,) and the carriage of such a letter subjects the master of a steamboat running regularly on a mail route, to a penalty.

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This act is a revenue law, within the meaning of the act of May 31, 1844, (5 Stats. at Large 658,) as to writs of error and appeals.

THE case is stated in the opinion of the court.

Crittenden, (attorney-general,) for the plaintiffs.

Sackett, contra.

[* 95] * M'LEAN, J., delivered the opinion of the court.

This is a case on error, from the circuit court of the northern district of New York.

An action of debt was brought in the district court, under the 10th section of the act of the 3d of March, 1845,¹ entitled: "An act to reduce the rates of postage, &c., and for the prevention of frauds on the revenue of the post-office department." It prohibits, under the penalties provided, any stage-coach, railroad car, steamboat, or other vehicle or vessel, or any of the owners, managers, servants, or crews of either, which regularly performs trips on a post-route, on which the mail is carried, from transporting letters, packages, or other mailable matter, except such as may have relation to some part of the cargo, or to some article at the same time conveyed in a stage or other vehicle.

The declaration charged the defendant, Bromley, as the captain of the packet-boat Empire, which regularly performed trips [* 96] * on the canal between Albion and Rochester, in the State of New York, on which line the mail was transported, under the authority of the post-office department, with transporting, otherwise than in the mail, divers letters, packets, and packages of letters, then and there being mailable matter, other than newspapers, &c., not having relation to the cargo.

The defendant pleaded *nil debet*, and the plaintiffs joined issue.

Evidence was given to show that the defendant was captain of the boat Empire, which performed trips between the places stated, and that the mail was regularly conveyed on the same route in 1845 and 1846. That Brainard, one of the witnesses, gave a note to Kelsey, the steward of the boat, written on two thirds of a sheet of foolscap paper, and folded the size of an ordinary letter, with a direction upon it, to be carried to Rochester. That the letter was an order to Mr. Palmer for tobacco, which was sent by the return boat, and for which Kelsey, the bearer, received fifty cents.

The testimony being closed, the defendant prayed the judge to instruct the jury that it did not establish a cause of action against the

¹ 5 Stats. at Large, 736.

defendant; and the judge instructed the jury that the paper conveyed by the steward of the boat, Kelsey, from Albion to Rochester, as sworn to by the witnesses, was not a letter or mailable matter, within the meaning of the act of congress; but was a paper having a different and distinct character of its own, and could be lawfully carried by the said steward of the packet-boat aforesaid, and did therefore direct the jury to find for the defendant, which they did; and to which instruction the plaintiff excepted.

The cause was afterwards removed to the circuit court by writ of error, and by which court the judgment of the district court was affirmed. This judgment of affirmance is now before us for revision.

This writ of error was issued under the act of the 31st of May, 1844,¹ entitled: "An act to amend the judiciary act passed the 24th September, 1789," which provides that final judgments in any circuit court of the United States, in any civil action brought by the United States for the enforcement of the revenue laws of the United States, or for the collection of the duties due on merchandise imported therein, may be examined, and reversed or affirmed in the supreme court of the United States, without regard to the sum or value in controversy in such action, at the instance of either party."

That the act which prescribes the offence charged is a revenue law, there would seem to be no doubt. In its title, it is declared to be an act to reduce the rates of postage, and for "the pre- [* 97]vention of frauds on the revenue of the post-office department." In its character and object it is a revenue law, as it acts upon the rates of postage and increases the revenue by prohibiting and punishing fraudulent acts which lessen it. Under the act of 1836, the revenue of the post-office department is paid into the treasury. Revenue is the income of a State, and the revenue of the post-office department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports.

We think the instruction of the court was erroneous. The letter or order, as it is called by some of the witnesses, was folded in the form of a letter and directed as such, though it was not sealed. A seal was not necessary to constitute it a letter or to make it chargeable with postage. The letter was not within the exception of the statute, as it did not relate to the cargo or to any article on board of the boat. It was an order for tobacco on Mr. Palmer, of Rochester, who was a dealer in that article. Among merchants, an order to the wholesale dealer for merchandise is a common subject of corre-

¹ 5 Stats. at Large, 653.

² 1 Ib. 73.

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spondence. And it may be doubted whether any other subject can be named on which more letters are written and forwarded in the mail. Two thirds of the half sheet which composed the letter was covered with writing, from which an inference may be drawn that something more than a mere order for goods was requested by the writer. But an order for goods, folded and directed as a letter, is clearly mailable matter, and a conveyance of it, as charged, is a violation of the law.

The judgment of the circuit court is reversed, and the cause is remanded to that court for further proceedings, according to law.

HALL NEILSON, (UNITED STATES,) Plaintiff in Error, v. CLARK B. LAGOW, DAVID H. LAGOW, and ELIZABETH S. LAGOW, Children and Devisees of WILSON LAGOW, deceased.

12 H. 98.

The 7th section of the act of May 1, 1820, (3 Stats. at Large, 568,) does not prevent the acquisition of the legal title to land by the United States, when taken as security for a debt by the proper officer, though not specially required or authorized by any particular act of congress.

A conveyance to trustees, in trust to sell the land and apply so much of the proceeds as may be needful to pay a debt, is not a purchase of the land by the creditor.

Though a deed contain language which would be sufficient to raise a use, executed, yet if it appear that the legal title was to continue in trustees, such language will be held only to declare a trust.

If land be conveyed to trustees, in trust to sell and convey a fee-simple, they take a fee, without words of limitation.

If the record does not show that the state court in fact decided the case upon a question of local law, this court will not infer that it was decided on such a point, if such decision would be erroneous.

THE case is stated in the opinion of the court.

Gillett and Crittenden, (attorney-general,) for the plaintiff.

Judah, contra.

[* 102] * CURTIS, J., delivered the opinion of the court.

This case comes here by a writ of error to the supreme court of the State of Indiana. The record shows that Lagow, the defendant in error, instituted an action of disseisin in a circuit court of the State of Indiana, whereby he sought to recover of Neilson, the plaintiff in error, a tract of land described in the counts. The tenant having pleaded the general issue, the case was committed to a jury. At the trial, it appeared that Lagow, together with Nathaniel Ewing, John D. Hay, and Caroline Smith, whose title, if any, Lagow

is alleged to have afterwards acquired, were in possession of the demanded premises in the *year 1820, claiming to own [*103] the same, and upon this evidence of title he rested his case.

The defendant then introduced a deed, bearing date September 19, 1821, from Lagow, Ewing, Hay, and Smith, conveying to the Bank of Vincennes, the State Bank of Indiana, the lands in controversy, excepting a certain square therein described. He also put in evidence another deed from the bank to Badollett, Harrison, and Buntin, conveying the same lands acquired by the bank under the deed last mentioned, and also transferring to the grantees some equitable title to the square excepted out of that deed. This conveyance is made to the grantees and their successors in the trusts declared by the deed, which are : " until the sale hereinafter authorized shall be made, the trustees, or a majority of them, or their successor or successors herein appointed, or who may hereafter be appointed agreeably to the mode hereinafter directed, shall and may demise or lease the whole or any part of the said lands, lots, and houses, until such time or times as a sale or sales thereof can be made, and receive and take the rents and profits thereof, also foreclose the said mortgages and collect the said notes ; in trust, nevertheless, for the use of the secretary of the treasury of the United States in extinguishment of the debt due by the said Bank of Vincennes to the United States ; and upon this further trust and confidence that the said trustees, or a majority of them, and their survivor or survivors herein appointed, or which shall hereafter be appointed, agreeably to the mode hereinafter directed, shall and do, whenever thereto requested by the secretary of the treasury of the United States, for the best price that can be got, sell and dispose of, for cash or on credit, on such terms, and in such parts or parcels, as to them shall seem most advantageous, all or any part of the above-described and conveyed lands, tenements, and hereditaments, to any person or persons who may be inclined to purchase the same ; and to execute and to acknowledge, in due form of law, deed or deeds of conveyance, unto the purchaser or purchasers, his heir or their heirs and assigns in fee-simple absolute and upon the further trust that they, the said trustees, or a majority of them, or the survivors of them herein appointed, or hereafter to be appointed agreeably to the mode hereinafter directed, shall and do pay and apply, of and every the sum and sums of money or other proceeds to be raised or paid by the rents or sales of the said lands and collections of the said notes, or any part or parts thereof, to the proper use of the United States, until the sum of one hundred and twenty thousand three hundred and eight dollars, which is now agreed upon by the said parties of the first part, of the one part ; and the honorable

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Jesse B. Thomas, as the legally authorized agent of the United States, of the other part, as the sum now due, together [* 104] with * interest on the said sum of money, at the rate of six per centum per annum until paid ; retaining thereout, however, their, the said trustees', expenditures, and a reasonable compensation for their trouble and services, returning and paying the overplus, if any, to the said president, directors, and company of the said Bank of Vincennes, their successors or assignees ; and also upon this further trust, as to all such parts of the said lands and premises, either in fee or under mortgage, as shall remain unsold, that they, the said trustees, and their successors, shall stand seised thereof to the use of the United States, until the debt aforesaid shall be fully paid and discharged, and thereafterwards to the use of the said president, directors, and company, their successors and assigns forever, provided always, and it is hereby expressly agreed and declared by and between the parties of these presents, that in case of the death of either or any one or more of the said trustees hereinbefore named, or of any trustees hereafter to be appointed, it shall and may be lawful to and for the said secretary of the treasury of the United States for the time being, at any time or times thereafter, by deed duly executed, to fill up such vacancies ; and the said trustees, when so appointed by the secretary of the treasury as aforesaid, shall all of them have the like power and authority to act in the several trusts according to the true intent and meaning of these presents, as fully and amply, to all intents and purposes, as if such new or other trustee or trustees had been actually named herein by the said president, directors, and company of the said Bank of Vincennes ; and provided, also, that no trustee now appointed, or to be hereafter named and appointed as above directed, shall in any event be liable for any more than he shall receive, nor for any loss or damage not occasioned wilfully and designedly by such trustee, or through his gross and wilful negligence."

Neither the *habendum* nor the grant in this deed contains the word heirs.

The tenant further offered in evidence, proceedings under a judicial sale of the title to the excepted square above mentioned, by which Badollett, Harrison, and Buntin, the trustees under the deed of the bank, became the purchasers of the legal title to that square, which was conveyed to them in fee-simple in 1827, and also introduced evidence to show that he was in possession under the trustees with a contract to purchase of them the entire tract of land demanded.

The plaintiff then put in evidence the record of a *quo warranto* against the bank, by which it appeared that in July, 1822, a judg-

ment of forfeiture was rendered against that corporation, and all its franchises and property seized into the possession of the State; and he offered proof that Badollett, Harrison, and Buntin purchased the legal title to the reserved square as trustees, [* 105] and that the money paid by them was from the funds of the United States, supplied by the order of the secretary of the treasury, and that all the trustees were deceased when the action was brought.

At the request of the plaintiff the court gave the following instructions: —

1. That on the proof of possession as owners by the Steam-Mill Company in 1820, and of the conveyance by the company to Lagow, of June, 1827, Lagow, the plaintiff, is entitled to recover, unless the defendant has shown a better title.

2. That the 7th section of the act of congress of 1st of May, 1820, forbids "the purchase of any land on account of the United States," unless authorized by act of congress.

3. That the term "purchase of land" in law, and in the act of congress, means any and every mode of acquiring an interest in real estate other than by inheritance.

4. That if the government is prohibited from purchasing land directly in its own name, it is also prohibited from purchasing indirectly in the name of an agent or trustee.

5. That if there is any act of congress or law authorizing the conveyance from the bank to the trustees, it is incumbent on the defendant to show it; and from the fact that the defendant does not set up any such act or law, the jury may infer there is none.

6. That all acts, deeds, and agreements, contrary to the plain language, or even to the policy, of an act of congress, are void.

7. That if the deed of trust from the bank is contrary to the letter or to the spirit and meaning, or to the policy of the act of the 1st May, 1820, it is void; and the interest which the bank then had in the land remained in the bank.

The court refused to give the following instruction requested by the defendant: —

"That it was competent for the Bank of Vincennes to make a deed to trustees for the benefit of the United States, and such a deed is valid and lawful for the purpose for which it was made. To which refusal of the court the defendant at the time excepted."

A verdict having been rendered in favor of the plaintiff, a motion for a new trial was made and refused, and in conformity with the practice of that court, exceptions were taken to such refusal, and having been allowed, the case went by appeal to the supreme court

of Indiana, which is the highest court of that State. So that the record, presented to the supreme court an assignment of three alleged errors, being the same relied on as causes for a new trial in the court below, namely:—

1. For the error of the court in misdirecting the jury.
- [* 106] *2. For the refusal of the court to give the instructions to the jury asked by the defendant.
3. Because the verdict is contrary to the law and evidence.

The supreme court affirmed the judgment of the circuit court, and under the 25th section of the judiciary act, 1 Stats. at Large, 85, the defendant has brought the record to this court by a writ of error.

To present intelligibly, the legal merits of the case at one view, and to show what question is here for decision, it should be stated that, by the law of Indiana, as expounded by the supreme court of that State, *The State Bank v. State*, 1 Blackf. 267, whatever real property was held by the bank, when its charter was annulled, went to the grantors thereof; that as Lagow and others, whose rights he is alleged to have acquired, were the grantors of this land to the bank, it became material to ascertain, whether the bank had any and what title to the land, when its franchises were seized; that the bank having conveyed by deed to Badollett and others as trustees, before the forfeiture took effect, the validity of that deed was necessarily drawn in question; that the court did in effect decide, that according to the true construction of section 7th of the act of congress of May 1, 1820, 3 Stats. at Large, 568, the defendant could take no title under, or through that deed, the same being void by force of that act; and consequently the title remained in the bank and passed to Lagow when the charter of the bank was vacated.

The question, therefore, which arises upon this writ of error is, whether the supreme court of Indiana rightly construed the act of congress, which is in these words: "That no land shall be purchased on account of the United States, except under a law authorizing such purchase."

The deed in question conveyed the land to Badollett and others, in trust to sell so much thereof as might be necessary to raise sufficient money to pay a debt due from the bank to the United States. It is clear this was not in any sense a purchase of land on account of the United States. In the land itself, the United States acquired by the deed, no interest. They were not even clothed with a right to acquire such an interest through the aid of a court of equity; for their title was not to the whole proceeds of the lands, whatever they might be, but only to so much of them as might be necessary to pay the debt of the bank. To this extent both the creditor and the

debtor had the right to insist on a sale, and whatever residue of land should remain, was by force of the deed, operating by means of a shifting, or secondary use, to go to the bank upon payment in full of the debt due to the United States. It is true, the deed *contains some language, which, taken by itself, might raise [* 107] a use, executed in the United States; but it is well settled that such language is controlled, by an intent, manifested in the instrument, to have the legal estate remain in trustees, to enable them to execute a trust which the deed declares; and where, as in this case, the trust is to sell and convey in fee-simple absolute, a legal estate is vested in the trustees commensurate with the interest which they must convey in execution of the trust. *Mott v. Buxton*, 7 Ves. 201; *Leonard v. Sussex*, 2 Vern. 526; and the cases in note (f) to *Chapman v. Blissett*, Cas. Temp. Talbot, 145-150; *Trent v. Hanning*, 7 East, 99; *Doe v. Willan*, 2 B. & A. 84.

It is clear, therefore, that these trustees, and not the United States, took the land under this deed, and that the latter acquired no interest in the land as such. This court has applied the same principles to the case of an alien, in *Craig v. Leslie*, 3 Wheat. 563, which settles that a devise of land to a citizen as a trustee, upon a trust to sell the land and pay over the proceeds to an alien, is a valid trust, and the interest of the alien is not subject to forfeiture. See also *Anstice v. Brown*, 6 Paige, 448, if it were necessary, therefore, we should hold that the act of congress was not applicable to this conveyance, because by it no title to land was purchased on account of the United States.

But we do not think it necessary to rest the decision of the case exclusively on this ground; for in our judgment the act of congress does not prohibit the acquisition by the United States of the legal title to land, without express legislative authority, when it is taken by way of security for a debt. It is the duty of the secretary of the treasury to superintend the collection of the revenue, and of the comptroller of the treasury to provide for the regular and punctual payment of all moneys which may be collected, and to direct prosecutions for all debts which may be due to the United States. 1 Stats. at Large, 65, 66. To deny to them the power to take security for a debt on account of the United States, according to the usual methods provided by law for that end, would deprive the government of a means of obtaining payment, often useful, and sometimes indispensably necessary. That such power exists as an incident to the general right of sovereignty, and may be exercised by the proper department if not prohibited by legislation, we consider settled by the cases of *Dugan's Ex'rs. v. United States*, 3 Wheat. 172. United

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States v. Tingey, 5 Pet. 117; United States v. Bradley, 10 Pet. 343; United States v. Linn, 15 Pet. 290.

These cases decide, that the United States being a body politic, as an incident to their general right of sovereignty, have a capacity to enter into contracts and take bonds, by way of security, [* 108] *in cases within the sphere of their constitutional powers, and appropriate to the just exercise of those powers, through the instrumentality of the proper department, when not prohibited by law, although not required to do so by any legislative act; and we think this same power extends to and includes taking security upon property for a debt already due. The assumption, that congress intended by the act in question to prohibit the just exercise of this useful power, is wholly inadmissible. In *United States v. Hodge et al.* 6 How. 279, a postmaster had made a mortgage of property, real and personal, to secure to the post-office department the sum of \$65,000, or such other sum as might be found due on a settlement six months after the mortgage. This mortgage embraced debts already due, and gave time to the debtor. The sureties on his official bond relied on its giving time as discharging them from their obligation. It is manifest that if the mortgage were void there was an end of the case, yet it is nowhere suggested that it was invalid, and it is treated by the court as an operative and effectual instrument. The object of any form of conveyance by way of security is not to acquire the dominion and ownership of land, nor even to invest funds therein, but simply to obtain payment of the debt secured. This is the principal thing to which all others are incidental. It may happen that, by the foreclosure of a mortgage containing no power of sale, the mortgagee may become the owner of the land under the mortgage; but this is not the object which the parties have in view when the mortgage is made, and takes place only because their main end is not attained, and by force of proceedings which ensue afterwards because their main end is not attained. Such a transaction is essentially different from a purchase of land in which the parties have nothing in view but to exchange for the present dominion and title of the land acquired by the purchaser, the money, or other price paid to the seller, and in analogous cases the distinction between these transactions has been recognized. An alien cannot have an action to enforce the title to land which he has taken by way of purchase; but this court has decided, in *Hughes et al. v. Edwards et ux.* 9 Wheat. 489, that an alien mortgagee may have the aid of a court of equity to foreclose a mortgage by a sale, because the debt is the principal thing and the land only an incident. So, though a corporation was by its charter authorized to take mort-

gages for debts previously contracted, it has been held that a mortgage to secure a debt contracted at the time the mortgage was given, was valid, because the intention of the legislature was only to prevent the corporation from purchasing lands, and not to prohibit it from taking security, in good faith, for the payment of its debts.

* *Silver Lake Bank v. North*, 4 Johns. C. R. 370; *Baird v.* [*109] *Bank of Washington*, 11 S. & R. 411. It is the opinion of the court, that by the true construction of the act of congress now in question, the government are not prohibited from taking security upon lands, through the action of the proper department, for debts due to the United States, and that the court erred in giving the act such a construction as to avoid the deed from the bank to the trustees.

The trustees purchased, at a judicial sale, the legal title to the reserved square, and paid for it out of the money of the United States; but they had previously taken in trust, by way of security, an equitable title thereto, and this transaction, though under the forms of a purchase, was, in truth, nothing more than relieving this parcel of land of an incumbrance, so that, when they should sell, they might obtain the entire benefit of the security. The purpose was precisely the same as that which induced the conveyance to them by the bank, and is not a purchase by the United States, prohibited by the act of congress, for the same reasons that the original conveyance is not within that act.

It remains to consider another view taken in argument by the counsel for the defendant in error. The argument is, that the supreme court of Indiana may have affirmed the judgment of the circuit court, upon the ground that the deed to the trustees not containing the word heirs, conveyed only a life-estate, the reversion remaining in the bank; and that, as the trustees were all dead when the action was brought, the estate in fee-simple in possession had reverted to the plaintiff Lagow. It has been settled, by a series of decisions in this court, beginning with *Miller v. Nichols*, 4 Wheat. 311, and coming down to *Smith v. Hunter*, 7 How. 738, that it must appear from the record that the highest court of the State passed on one of the questions described in the twenty-fifth section of the judiciary act; and different modes in which this may appear by the record are pointed out in *Armstrong v. The Treasurer of Athens Company*, 16 Pet. 281. It has never been held that the record of the proceedings of the highest court must state in terms a misconstruction by that court of the act of congress. It is enough that it is an inference of law, from the inspection of the whole record, that the highest court did thus misconstrue an act of congress, and annul a right or title, otherwise

valid, by reason of such misconstruction. Any other rule, confining this court to an inspection of that part of the record which sets out the proceedings of the highest court alone, would be a departure from the general principle, that the whole of an instrument is to be looked at to determine the effect of each part of it, would present for decision an artificial and not a real case; and, inasmuch as the [* 110] *highest state court often simply affirms or reverses the judgment below, would, in all such cases, deprive the citizen of the rights secured to him by the constitution and the twenty-fifth section of the judiciary act. And it has been the practice of this court, whenever necessary, to look at the record of the proceedings of the inferior state court in connection with the proceedings of the highest court, in order to deduce therefrom the points decided by the latter. Now the bill of exceptions taken in this case in the circuit court shows that the construction of the act of congress was in question in that court, was misconstrued there, and a deed, under which the plaintiff in error deduced title, was decided to be void by reason of such misconstruction.

This decision being excepted to, was, by the appeal, brought before the supreme court; and when that court determined that the judgment of the circuit court be in all things affirmed, it must be taken that the supreme court affirmed the correctness of the decision thus excepted to, unless it appears by the record that they proceeded on some other ground; and so the inquiry still remains, whether the supreme court did not affirm the judgment of the circuit court, upon the ground suggested in argument by the counsel for the defendant in error, that the deed in question conveyed only a life-estate, which had terminated before action brought. We cannot make that deduction from this record. It does not appear that the question, what that deed conveyed, if valid, was in any manner raised in the circuit or supreme court; and, assuming that the supreme court were not confined on the appeal to points raised in the court below, but might have decided upon any ground shown by the record before them to be tenable, we cannot infer that the decision rested on this ground, because we are of opinion it is not tenable. If it had appeared affirmatively in the record that the supreme court did decide that the deed conveyed only a life-estate, this court would not inquire into the correctness of that decision; but when put to infer what points may have been raised, and what that court did decide, we cannot infer that they decided wrong; otherwise, nothing would be necessary in any case to prevent this court from reversing an erroneous judgment under the twenty-fifth section of the judiciary act, but that counsel should raise on the record some point of local law, however

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erroneous, and suggest that the court below may have rested its judgment thereon.

Now, on looking into the deed from the bank to the trustees, we find that the grant is to them and their successors, in trust, to sell and convey in fee-simple absolute. The legal estate being in trust, must be commensurate therewith, and will *be [* 111] deemed to be so without the use of the usual words of limitation. *Newhall v. Wheeler*, 7 Mass. 189; *Stearns v. Palmer*, 10 Met. 32; *Gould v. Lamb*, 11 Met. 84; *Fisher v. Fields*, 10 Johns. 505; *Welch v. Allen*, 21 Wend. 147. As the execution of the trust required the trustees to have a fee-simple, in order to convey one, we are of opinion that the deed to them conveyed a fee, and consequently we cannot infer that the state court decided that only a life-estate passed by the deed.

The opinion of the court is, that the judgment of the court below should be reversed, and the cause remanded for another trial to be had therein.

14 H. 488; 6 Wal. 458.

NATHANIEL WILLIAMS, as permanent Trustee for the Creditors of JAMES WILLIAMS, an Insolvent Debtor, Plaintiff in Error, v. CHARLES OLIVER, ROBERT M. GIBBES, and THOMAS OLIVER, Executors of ROBERT OLIVER, and JOHN GLENN, and DAVID M. PERINE, Trustees.

12 H. 111.

Gill v. Oliver's Executors, 11 How. 529, affirmed, and the decision applied to this case. If it clearly appear that the decision of the state court would have been the same, independent of a law of the State, which the plaintiff in error insisted impaired the obligation of a contract, this court will not reverse the decision on that ground, and send the case back to be again decided the same way upon the other ground.

THE particular facts of this case, not stated in the case in 11 How. 529, appear in the opinion of the court.

Dulany and Schley, for the plaintiff.

Campbell and Johnson, contra.

* NELSON J., delivered the opinion of the court. [* 119]

This case is not distinguishable from the case decided at the last term of *Gill v. Oliver's Executors*, and which was dismissed for want of jurisdiction.

* It is reported in 11 How. 529. That case involved the [* 120] right to the share of Lyde Goodwin as a member of the

"Baltimore Mexican Company," in the fund that had been awarded to the members of that company by the commissioners under the convention of 1839¹ with Mexico. Gill claimed it as permanent trustee under the insolvent laws of Maryland, the benefit of which Goodwin had obtained in 1817, on the assignment of all his property for the use of his creditors.

The executors of Oliver claimed the right of Goodwin to this fund under an assignment made by himself 30th May, 1829.

The money awarded by the commissioners to this company under the treaty, had, by the agreement of all parties claiming an interest in the same, been deposited in the Mechanics' Bank of Baltimore, to be distributed according to the rights of the respective parties claiming it.

The court of appeals of Maryland decided against the right of Gill, as the permanent trustee of Goodwin, under the insolvent proceedings, and in favor of the right of the executors of Oliver.

The case was brought here by writ of error for review, and was dismissed as we have stated for want of jurisdiction.

The court of appeals of Maryland had decided against the right of Gill, on the ground that the contract made by the "Baltimore Mexican Company" with General Mina, in 1816, by which means were furnished him to carry on a military expedition against the territories and dominions of the king of Spain, a foreign prince with whom the United States were at peace, was in violation of our neutrality act of 1794,² and consequently illegal and void, and could not be the foundation of any right of property, or interest existing in Goodwin in 1817, the date of the insolvent proceedings, and hence, that no interest in the subject-matter passed to the permanent trustees, setting up a title under them.

After the revolutionary party in Mexico had achieved their independence, and about the year 1825, the public authorities, under the new government, recognized this claim of the Baltimore Company, as valid and binding upon it, and as such it was brought before the board of commissioners, under the convention of 1839, and allowed.

It was not denied on the argument, and, indeed, could not have been, successfully, that the contract with General Mina, in 1816, was illegal and void, having been made in express violation of law; and hence that no interest in, or right of property arising out of it, legal or equitable, could pass, in 1817, the date of the insolvent proceedings of Goodwin, to the trustee, for the benefit of his creditors. But it was urged, that the subsequent recogni

¹ 8 Stats. at Large, 526.

² 1 Ibid. 381.

tion and adoption of the obligation by the new government, had relation back, so as to confirm and legalize the original transaction, and thereby give operation and effect to the title of the trustee at the date mentioned.

And upon this ground it was insisted that the decision of the court below, denying the right of Gill, the permanent trustee, was a decision against a right derived under the treaty and award of the commissioners, which therefore brought the case within the 25th section of the judiciary act.¹

Undoubtedly, upon this aspect of the case, and assuming that there was any well-founded ground to be found in the record for maintaining it, jurisdiction might have been very properly entertained; and the question as to the effect of the recognition of the obligation by Mexico, and award under the treaty in pursuance thereof, upon the right claimed by the trustee under the insolvent proceedings, examined and decided. The decision below, in this aspect of the case, must have involved the effect and operation of the treaty, and award of the commissioners under it.

But, a majority of the court were of opinion that no such question existed in the case, or was decided by the court below; and that the only one properly arising, or that was decided, was the one growing out of the contract with General Mina of 1816, and of the effect and operation to be given to it under the insolvent laws of Maryland.

The money awarded to the Mexican company was a fund in court, and had been brought in by the consent of all parties concerned, for distribution according to their respective rights. The plaintiff in error claimed the share of Goodwin, under the insolvent proceedings of 1817, as trustee for the creditors through the contract with Mina — the defendants by virtue of an assignment from Goodwin himself in 1829, after Mexico had recognized and acknowledged the claim as valid. The money had been awarded to certain persons "in trust for whom it may concern," without undertaking to settle the rights of the several claimants. The court, in giving effect and operation to the insolvent laws of Maryland, as to the vesting of the property and estate of the insolvent in the hands of the trustee, for the benefit of the creditors, held, that no interest or right could be claimed under them through the contract of 1816, but that the right of Goodwin to the fund passed by his assignment in 1829 to the defendants.

Mr. Justice Grier, in delivering the opinion of the majority of the court, speaking of that decision, observes, that in deciding the question, the courts of Maryland have put no construction on the treaty or award asserted by one party to be the true one, and denied

¹ 1 Stats. at Large, 85.

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[*122] by the other. It was before them as a fact only, and *not for the purpose of construction. Whether this money paid into the court under the award, and first acknowledged by Mexico as a debt in 1825, existed as a debt transferable by the Maryland insolvent laws in 1817, or whether it, for the first time, assumed the nature of a *chose in action* transferable by assignment after 1825, when acknowledged of record by Mexico, and passed by the assignment of Lyde Goodwin to Robert Oliver, was a question wholly *dehors* the treaty and award, and involving the construction of the laws of Maryland only, and not of any treaty, or statute, or commission, under the United States. And Mr. Justice Woodbury, who dissented on the question of jurisdiction, observes, that the claim, so far as it regards the enforcement of the treaty with Mexico, does not seem to have been overruled in terms by the state court. That court did not decide that the treaty was corrupt or illegal, or in any way a nullity, when they held that the original contract violated the laws of neutrality. So far, too, as regards the award made by the commissioners, that the Baltimore Mexican company, and their legal representatives, had a just claim under the treaty for the amount awarded, it was not overruled at all.

Again, he observes, that all must concede, that the state court speaks in language against the Mina contract alone as illegal, and in terms do not impugn either the treaty or the award; and it is merely a matter of inference or argument that either of these was assailed, or any right properly claimed under them overruled. But it is true the court held that Oliver's executors, rather than the appellant, were entitled to the fund furnished by Mexico, and long subsequent to Mina's contract; but in coming to that conclusion, they seem to have been governed by their own views as to their own laws and the principles of general jurisprudence. The treaty or award contained nothing as to the point whether Gill or Oliver's executors had the better right to his share, but only that the Mexican company and their legal representatives should receive the fund. This last the court did not question.

The decision of the court below, therefore, not involving the validity of the treaty, or award of the commissioners, or lawfulness or character of the fund, but simply the right and title to the respective shares claimed in it, after the fund had been paid over by the government, and brought into court for distribution according to the agreement of all concerned, and which distribution depended upon the laws of the State, a majority of the court, taking this view of the case, held, that there was a want of jurisdiction, and dismissed the writ of error; and that the decision, whether right or wrong, could

not be the subject of review under the 25th section of the judiciary act, as it involved *no question, either directly or [* 123] by necessary intendment, arising upon the treaty or award, or connected with the validity of either; and if this court were right in the view thus taken of the case, there can be no doubt as to the correctness of the conclusion arrived at. A different view of the case might, of course, lead to a different conclusion.

Now, in the case before us, the plaintiff in error claims the share of John Gooding, one of the members of the Mexican company, as permanent trustee under the insolvent laws of Maryland, having been appointed 29th January, 1842, Gooding having taken the benefit of these acts, and assigned his property for the benefit of the creditors as early as 1819.

George Winchester had been previously appointed provisional trustee on the 23d June, 1819, to whom all property had been assigned, and on the 2d May, 1823, had been appointed permanent trustee, and gave a bond for the faithful execution of his duties without surety, and on the 2d April, 1825, sold the interest of Gooding in this share to Robert Oliver, under an order of sale made by the Baltimore county court, having jurisdiction in the matter, for the consideration of \$2,000. And in 1841, the legislature of Maryland passed a law confirming this sale, a doubt having been suggested as to its validity, for want of a surety to the official bond of the trustee.

In this state of the case the court of appeals of Maryland held, that the interest of Gooding in the Mexican contract did not pass, under their insolvent laws, to the plaintiff in error as permanent trustee, for the reasons assigned in the previous case of *Gill v. Oliver's Executors*. And that if it did or could have passed under these laws, it passed to Winchester, the previous trustee, in connection with the confirming act of the legislature 1841.

It is apparent, therefore, if the decision in the case of *Gill v. Oliver's executors* involved no question that gave to this court jurisdiction to revise it here, as has already been decided, none exists in the case before us; for, as it respects the question of jurisdiction, the two stand upon the same footing, and involve precisely the same principles.

The counsel for the plaintiff in error sought to distinguish this case from the previous one, and to maintain the jurisdiction of the argument, upon the ground that the act of the legislature of Maryland of 1841, confirming the authority of Winchester, the permanent trustee, was in contravention of a provision of the constitution of the United States, as a "law impairing the obligation of contracts."

But, admitting this to be so, (which we do not,) still, the admission

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would not affect the result. For the decision upon the previous *branch of the case denied to the plaintiff any right to, or interest in, the fund in question, as claimed under the insolvent proceedings, as permanent trustee, and hence he was deemed disabled from maintaining any action founded upon that claim.

It was of no importance, therefore, as it respected the plaintiff in the distribution of the fund, whether it was rightfully or wrongfully awarded to Oliver's executors. He had no longer any interest in the question.

In order to give jurisdiction to this court to revise the judgment of a state court, under the 25th section of the judiciary act, a question must not only exist on the record, actually or by necessary intendment, as mentioned in that section and the decision of the court as there stated, but the decision must be controlling in the disposition of the case; or, in the language of some of the cases on the subject, "the judgment of the state court would not have been what it is, if there had not been a misconstruction of some act of congress, or a decision against the validity of the right, title, privilege, or exemption set up under it." 3 Pet. 292, 302. Or, as stated by Mr. Justice Story, in *Crowell v. Randell*, 10 Pet. 392, where he reviewed all the cases, it must appear "from the facts stated by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment." And in a recent case, 5 How. 341, following out the doctrine of the previous cases: "It is not enough that the record shows that the plaintiff in error contended and claimed that the judgment of the court impaired the obligation of a contract, and violated the provisions of the constitution of the United States, and that this claim was overruled by the court; but it must appear by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment."

It is not intended, nor to be understood, from these cases, that the question, thus material to the decision arrived at, must be confined exclusively and specially to the construction of the treaty, act of congress, &c., in order to give the jurisdiction, as this would be too narrow a view of it. Points may arise growing out of, and connected with the general question, and so blended with it as not to be separated, and, therefore, falling equally within the decision contemplated by the 25th section. The cases of *Smith v. The State of Maryland*, 6 Cranch, 286, and *Martin v. Hunter's Lessee*, 1 Wheat. 304, 355, afford illustrations of this principle.

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Now, as the decision of the question involving the right and *title of the plaintiff in error to Gooding's interest in this [* 125] fund under the insolvent proceedings was against him in the court below, and was one which, in our judgment, involved only a question of state law, and, therefore, not the subject of revision here, and was conclusive upon his rights, and decisive of the case, it follows that we have no jurisdiction within the principle of the cases to which we have referred; for the determination of the court upon the validity of the act of the legislature of 1841, in no way controlled the judgment at which the court arrived, as respected the plaintiff. That turned upon the decision as to the right of the plaintiff to the fund under the insolvent proceedings, as permanent trustee of Gooding, and whatever might have been the opinion of the court upon the other question, the result of their judgment would have been the same.

For the reason, therefore, that this case falls directly within the decision of *Gill v. Oliver's Executors*, 11 How. 529, and is not distinguishable from it, the case must take the same direction, and be dismissed for want of jurisdiction.

12 H. 125; 17 H. 282, 289; 20 H. 535; 24 H. 817; 6 Wal. 258.



NATHANIEL WILLIAMS, as permanent Trustee for the Creditors of **JOHN GOODING**, an Insolvent Debtor, *v.* **CHARLES OLIVER**, **ROBERT M. GIBBS**, and **THOMAS OLIVER**, Executors of **ROBERT OLIVER**, and **JOHN GLENN** and **DAVID M. PERRINE**, Trustees.

12 H. 125.

* **NELSON, J.**, delivered the opinion of the court. [* 126]

This case involves the same principles as the case of *Williams*, permanent trustee of *James Williams*, 12 How. 111, already decided; and we refer to the opinion there delivered, for our decision in this case.

The case is dismissed for want of jurisdiction.



GREENBERRY DORSEY, Complainant and Appellant, *v.* **SAMUEL PACKWOOD**.

12 H. 126.

Upon a bill for specific performance of a contract to convey land, *held*, that the complainant was not entitled to a decree. 1. Because he had shown no performance or offer to perform, on his own part. 2. Because an agreement to convey in consideration of payments to be made out of the profits of the vendor's lands, was not a contract which a court of equity would enforce. 3. That the complainant had abandoned and released his claim.

APPEAL from the circuit court of the United States for the eastern district of Louisiana. The case is stated in the opinion of the court.

Henderson, for the appellant.

Butler, contra.

[* 134] * GRIER, J., delivered the opinion of the court.

The record of this case covers 840 pages; and the abstracts and briefs of counsel, nearly 300. But as the merits of the case, when extricated from the mass of matter with which it is enveloped, depend on the application of undisputed principles and axioms of the law, to a few leading facts, it will not be necessary that our statement of it should be proportionally voluminous.

Dorsey, the complainant and appellant, filed his bill in the circuit court of Louisiana in March, 1848, claiming the specific execution of a contract in writing, executed on the 16th of April, 1821, which is as follows:—

“Samuel Packwood, now in the city of New Orleans, having lately purchased the plantation heretofore belonging to John La Farge, situated below town, on the right bank of the river, about eleven leagues, binds himself his heirs and executors, to transfer unto G. Dorsey, his heirs and executors, one half of the plantation above mentioned, also one half of the slaves, cattle, and stock, farming utensils, &c. &c. as soon as said G. Dorsey shall pay for one half of the cost of said property, either with his own private means, or with one half of the profits of the plantation; but it is agreed upon and well understood by said G. Dorsey, that Samuel Packwood, until said transfer is made, has the right and privilege of selling and disposing and transferring of said plantation to any person or persons that he may think proper to sell to, without consulting or asking the consent of said G. Dorsey, and the consent of said G. Dorsey shall not be necessary to make the sale good; and it is further agreed upon, that Samuel Packwood is to have the entire and complete control of said plantation, and every thing that appertains

[* 135] to it, until said transfer *is made to G. Dorsey; but if said Packwood should sell at any time previous to said transfer to G. Dorsey, he shall be answerable for, and shall account to said G. Dorsey for one half of the net profits of said sale.”

At the time this paper was executed, Packwood resided in New York, but was owner of valuable property in New Orleans, from which he derived his principal income. Dorsey was his son-in-law,

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and a member of the mercantile firm of Morgan, Dorsey, and Co. This firm was in good credit, and acted as the financial agent of Packwood, lending him their acceptances, and advancing money for him, to enable him to complete his purchases, up to the time of their failure and bankruptcy, in 1825. At this time the firm was largely in advance to Packwood; but the balance due was afterwards paid by him, with interest. Dorsey had been chiefly instrumental in persuading Packwood to make this purchase, and owing to his expectation of a share in the speculation in case it should turn out to be profitable, the commissions charged for these financial accommodations were probably not so great as they otherwise might have been; and for the same reasons, also, Dorsey took an interest in the management of the plantation, made additional purchases, gave advice and superintendence, without at first making such additional charges as might have been made for similar services rendered to a stranger.

When this purchase was made, the parties seem to have expected that after the first payment of \$25,000 was made by Packwood, the profits of the plantation might in a great measure be depended on to liquidate the balance of its cost. But they were greatly deceived in this expectation. For many years the crops did not equal the expenses; so that, at the time of the failure of the firm of Morgan, Dorsey, and Co. in 1825, Packwood was in debt for the plantation, and the additional purchases of land and negroes, a sum exceeding one hundred and fifty thousand dollars, (\$150,000.) Dorsey had paid nothing, and was then unable to pay any thing. The speculation seeming likely to turn out disastrous, he ceased to expect any advantage from it, or claim any interest in it, and accordingly, he advised Packwood to sell the greater part, if not all of it, "with the hope that he (Packwood) might get out of the scrape in four or five years." Indeed, for some years after this it appeared doubtful whether Packwood would be able to extricate himself from his pecuniary embarrassments consequent on this purchase. He finally succeeded, however, after a further struggle of some twelve or fifteen years, by sales of his other property, and the profits of the plantation, to rescue himself from impending ruin, and pay the debts in which he had been involved. During all
* this time, Dorsey was unable to help Packwood out of his [* 136] difficulties, and ceasing to consider his expectations from Packwood's contract with him to be of any value, and as it might be considered a cloud upon the title, at the request of Packwood he voluntarily executed and sent to him the following release, witnessed by his wife:—

"This is to certify, that I hereby abandon and release unto

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Mr. Samuel Packwood, any claim I have or might have to any interest in or to his plantation, in the parish of Plaquemines, or profits of the same, by virtue of any written document he may have given, or verbal promises made upon the subject."

New Orleans, 20th January, 1836.

G. DORSEY.

Witness: E. H. Dorsey.

From this time till 1838, Dorsey had the agency of the plantation under a power of attorney from Packwood. In that year Packwood cancelled his power of attorney, and appointed another agent, alleging that Dorsey had misused his power by indorsing his principal's name to sustain his private credit. This was the beginning of a coldness between the parties, which, after the refusal of Packwood to incur liabilities for Dorsey in 1840, and after the death of Mrs. Alice Packwood, the mother of Mrs. Dorsey, and the marriage of Packwood to a second wife, became a bitter family quarrel, followed by much litigation between the present parties. The nature and result of these suits, it is not necessary, for the purposes of the present case, to specify. Suffice to say, that Dorsey now revived his claim to a share in the Myrtle Grove property, on the ground that his half of the purchase-money had been paid by the rents and profits of the estate, and finally instituted this suit in March, 1848.

In the original bill, the complainant founds his title to relief on an alleged lost agreement, dated on the 12th of April, 1823. But after the production by the respondent, of this instrument, dated 16th of April, 1821, he amended his bill, and made his claim under it. The respondent, in his answer, denies the existence of any other agreement either written or parol, and there is no proof to show the existence of either. The right of the complainant to relief will therefore depend on this instrument of writing, in connection with the facts, a brief outline of which we have endeavored to give, so far as we think them material to the decision of the cause.

There is no allegation in the bill, or proof, that any clause was omitted from this instrument, either through mistake or inadvertence. It is signed by both parties in presence of attesting witnesses; and is expressed in clear and precise terms. But there is one characteristic necessary to give it validity as a binding contract, in [*137] which it is entirely deficient. It wants mutuality. * It imposes no obligations on Dorsey whatever. He is not bound either to render services or pay money as a consideration for one half the land. Packwood could not support a suit upon it to compel Dorsey to do any thing. It is not an alternative obligation, because Dorsey is not bound to perform either alternative. The allegation, that "Dorsey elected the alternative of paying for the

and out of the profits," (or, in other words, with Packwood's money,) amounts only to this: That he was willing to accept one half of the plantation as a gift, but would pay no part of the purchase money out of his own pocket. Nor is there any evidence that Dorsey ever notified Packwood of his election to do any thing. On the contrary, in January, 1825, before the failure of the firm of Morgan, Dorsey, and Co., when the speculation appeared likely to be a ruinous one, he elects to have Packwood "get out of the scrape," the best way he could, and his release, given in 1836, shows his election to claim no interest in the property whatever. But even assuming that Dorsey was bound by this contract, it cannot come within the category of alternative obligations, where one of the alternatives was to pay with Packwood's money, and give nothing of his own.

"An obligation," says Pothier, "is not alternative, where one of the things is not susceptible of the obligation intended to be contracted; but in this case the obligation is a determinate obligation of the other. Therefore, it was decided, in l. 72, § 4, ff. *de sol*, that if a person promised me in the alternative two things, whereof one belonged to me already, that he had not the liberty of paying that in lieu of the other—not even although it might afterwards cease to belong to me; because this not being, at the time of the contract, susceptible of the obligation contracted in my favor, the other only was due; *cum re sua nemo deberi possit*." Evans's Pothier, Part 2, c. 3, art. 6, No. 249. Assuming the obligation to be mutual, Dorsey was bound to "pay with his own private means one half of the cost" of the property, or offer to do it within a reasonable time, before he could claim the interference of a court of equity to enforce a specific execution of this contract. Equity will not decree the specific execution of mere nude pacts, or voluntary agreements not founded on some valuable or meritorious consideration. The same rule is applied to imperfect gifts, *inter vivos*, to imperfect voluntary assignments of debts or other property, to voluntary executive trusts, and to voluntary defective conveyances.

When the obligation is mutual, the party asking a specific performance must show that he has been in no default in not having performed the agreement on his part, and that he has taken all proper steps towards the performance. He must show himself desirous, prompt and eager to perform the contract. If he has been guilty of gross laches, or if he applies for [* 138] relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed.

It is clear, then, from this statement of the facts and law as they

affect this case, that the complainant has not shown a case which will entitle him to a decree in his favor.

For, 1. If he was bound at all, he has shown no performance, or offer of performance, after an interval of twenty-seven years.

2. The agreement, by Packwood, to convey one half of the land purchased and paid for by himself, in consideration of a payment "from the profits of the plantation," which equally belonged to himself, was but the promise of a gift, a nude pact which equity will not enforce.

3. The release by the complainant in 1836, fifteen years after the agreement, when he had paid nothing for the land, either out of his own pocket, or even "by the profits of the plantation," (if such could be called a payment,) was a voluntary abandonment of all claim under it. Whether, if he had paid one half the purchase-money, and had a good equitable title to the land, a release without a consideration would operate as an equitable bar to his claim, we need not inquire. But as cumulative evidence of a total abandonment of all claim under an executory agreement of which he had performed no part, it furnishes an additional reason for refusing him a decree, to which he would not be entitled, even if such release had never been given.

The decree of the circuit court is, therefore, affirmed, with costs.

GILBERT C. RUSSELL, Appellant, v. DANIEL R. SOUTHARD, SAMUEL D. TOMPKINS, and WILLIAM C. BULLETT and WILLIAM H. POPE, Administrators of JAMES BURKS, deceased, WILLIAM L. THOMPSON, Guardian to JAMES BURKS, SAMUEL BURKS, CHARLES BURKS, and NANCY BURKS, infant Children of JAMES BURKS, deceased, MATILDA BURKS and JOHN BURKS, Heirs of said JAMES BURKS, deceased.

12 H. 139.

On a bill to redeem, parol evidence is admissible to show that what appears upon the written papers to have been a conditional sale for an agreed price, was in fact a loan of money, and that the land was but a security for the money lent.

The inadequacy of the sum mentioned in the papers as the consideration of the alleged sale, is an important circumstance to show that the transaction was not in truth a sale, but a mortgage; and in a doubtful case, courts will incline to consider it a mortgage.

Though no personal security for the repayment of the money was given in writing, yet where the written memorandum ascertains the amount advanced, and the oral evidence shows it was by way of loan, the relation of debtor and creditor exists and *assumpsit* will lie, and the conveyance is a mortgage.

Though a mortgagee in possession may take a release from the mortgagor, the transaction is to be carefully scrutinized, and if any unconscientious advantage was taken, the release will be set aside.

An account of rents and profits is not an inseparable incident to the redemption of a mort-

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gage of lands; laches by the mortgagor may, and in this case did, operate as a waiver of the right.

A mortgagee in possession, who obtains insurance, and pays the premium, is not accountable to the mortgagor for what was received under the policy.

The act of March 3, 1803, § 2, (2 Stats. at Large, 244,) prohibits this court from receiving new evidence on an appeal in an equity cause.

THE case is stated in the opinion of the court.

Underwood and *Morehead*, for the appellant, (with whom was *Clay*.)

Nicholas, contra.

* CURTIS, J., delivered the opinion of the court. [* 145]

This is a suit in equity to redeem a mortgage, brought here by appeal from the circuit court of the United States for the district of Kentucky.

On the 24th day of September, 1827, Russell, the complainant, conveyed, by an absolute deed in fee-simple, to James Southard, * deceased, whose brother and devisee, Daniel R. [* 146] Southard, is the principal party defendant in this bill, a farm, containing 216 acres, situated about two miles from the city of Louisville.

At the time the deed was delivered, and as part of the same transaction, Southard gave to Russell a memorandum, the terms of which are as follows : —

“ Gilbert C. Russell has sold and this day absolutely conveyed to James Southard, said Russell’s farm near Louisville, and the tract of land belonging to said farm, containing 216 acres, and the possession thereof actually delivered on the following terms, for the sum of \$4,929.81½ cents, which has been paid and fully discharged by the said Southard as follows, namely: first \$2,000, money of the United States, paid in hand; secondly, the transfer of a certain claim in suit in the Jefferson circuit court, Kentucky, in the name of James Southard against Samuel M. Brown and others, now amounting to the sum of \$1,558.87½; and thirdly, the transfer of another claim in the same court, in the name of Daniel R. Southard against James C. Johnston and others, now amounting to the sum of \$1,270.94, as by reference to the records for the more precise amounts will more fully appear. The said Gilbert C. Russell has taken, and doth hereby agree to receive from said Southard aforesaid, two claims against Brown, &c., and James C. Johnston, &c., as aforesaid, without recourse in any event whatever to the said James Southard, or his assignor, Daniel R. Southard, of the claim of said Johnston, &c., or either, and to take all risk of collection upon himself, and make the best of said claim he can.

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" The said James Southard agrees to resell and convey to the said Russell, the said farm and 216 acres of land, for the sum of forty-nine hundred and twenty-nine [dollars] 81½ cents, payable four months after the date hereof, with lawful interest thereon from this date. And the said Russell agrees, and binds himself, his heirs, &c., that if the said sum and interest be not paid to the said James Southard, or his assigns, at the expiration of four months from this date, that then this agreement shall be at an end, and null and void ; and the wife of said Russell shall relinquish her dower within a reasonable time, as per agreement of this date. This agreement of resale by the said James Southard to the said Russell, is conditional and without a valuable consideration, and entirely dependent on the payment, on or before the expiration of four months from and after the date hereof, of the said sum of \$4,929.81½, and interest thereon from this date as aforesaid. And this agreement is to be valid and obligatory only [* 147] upon the said James * Southard, upon the punctual payment thereof of the sum and interest as aforesaid, by the said Gilbert C. Russell.

" In witness whereof the parties aforesaid have hereunto set their hands and seals, at Louisville, Kentucky, on this 24th day of September, 1827.

GILBERT C. RUSSELL, [SEAL.]

JAMES SOUTHARD, [SEAL.]

" Witness present, signed in duplicate—

" J. C. JOHNSTON."

The first question is, whether this transaction was a mortgage, or a sale.

It is insisted, on behalf of the defendants, that this question is to be determined by inspection of the written papers alone, oral evidence not being admissible to contradict, vary, or add to, their contents. But we have no doubt extraneous evidence is admissible to inform the court of every material fact known to the parties when the deed and memorandum were executed. This is clear, both upon principle and authority. To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practised, under the shelter of any written papers, however precise and complete they may appear to be. In *Conway v. Alexander*, 7 Cranch, 238, C. J. Marshall says : " Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances, which are to determine whether it was a sale or a mortgage ;" and in *Morris v. Nixon*, 1 How. 126, it is stated : " The charge against Nixon is, substantially, a fraudulent attempt to convert that into an absolute sale, which was originally meant to be a security for a loan. It is in

this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face."

These views are supported by many authorities. *Maxwell v. Montacute*, *Precedents* in Ch. 526; *Dixon v. Parker*, 2 Ves. Sen. 225; *Prince v. Bearden*, 1 A. K. Marsh. 170; *Oldham v. Halley*, 2 J. J. Marsh, 114; *Whittick v. Kane*, 1 Paige, 202; *Taylor v. Luther*, 2 Sumner, 232; *Flagg v. Mann*, *ibid.* 538; *Overton v. Bigelow*, 3 Yerg. 513; *Brainerd v. Brainerd*, 15 Conn. 575; *Wright v. Bates*, 13 Verm. 341; *McIntyre v. Humphries*, 1 Hoff. Ch. R. 331; 4 Kent, 143, note A, and 2 Greenl. Cruise, 86, note.

It is suggested that a different rule is held by the highest court of equity in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted, or rejected, not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles. *Robinson v. *Campbell*, 3 Wheat. 212; [* 148] *United States v. Howland*, 4 *ibid.* 108; *Boyle v. Zacharie et al.* 6 Pet. 658; *Swift v. Tyson*, 16 *ibid.* 1; *Foxcroft v. Mallett*, 4 How. 379. But we do not perceive that the rule held in Kentucky differs from that above laid down. That rule, as stated in *Thomas v. McCormack*, 9 Dana, 109, is that oral evidence is not admissible in opposition to the legal import of the deed and the positive denial in the answer, unless a foundation for such evidence had been first laid by an allegation, and some proof of fraud or mistake in the execution of the conveyance, or some vice in the consideration.

But the inquiry still remains, what amounts to an allegation of fraud, or of some vice in the consideration—and it is the doctrine of this court, that when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as a payment of purchase-money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage; and we know of no court which has stated this doctrine with more distinctness, than the court of appeals of the State of Kentucky. In *Edrington v. Harper*, 3 J. J. Marshall, 355, that court declared: "The fact that the real transaction between the parties was a borrowing and lending, will, whenever or however it may appear, show that a deed absolute on its face was intended as a security for money; and whenever it can be ascertained to be a security for money, it is only a mortgage, however artfully it may be disguised." We proceed then to examine this case by the light of all the evidence, oral and written, contained in the record.

The deed and memorandum certainly import a sale; the question is, if their form and terms were not adopted to veil a transaction differing in reality from the appearance it assumed?

In examining this question, it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practised, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and, therefore, in the cases on this subject, great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold. *Conway v. Alexander*, 7 Cranch, 241; *Morris v. Nixon*, 1 How. 126; *Vernon v. Bethell*, 2 Eden, 110; *Oldham v. Halley*, 2 J. J. Marsh. 114; *Edrington v. Harper*, 3 *ibid.* 354.

Upon this important fact the evidence leaves the court in no doubt. The farm, containing 216 acres, was about two miles from Louisville, and abutted on one of the principal highways [* 149] leading to that city. A dwelling-house, estimated to have cost from \$10,000 to \$12,000, was on the land.

In May, 1826, about sixteen months before this alleged sale, Russell purchased the farm of John Floyd, and paid for it the sum of \$12,960. Some attempt is made to show, by the testimony of Mr. Thurston, that this sum was not paid as the value of the land; but what he says upon this point is mere conjecture, deduced by him from hearsay statements, and cannot be allowed to have any weight in a court of justice. There is some conflict in the evidence respecting the state of the fences and the agricultural condition of the lands at the time in question, but we do not find any proof that the lands had been permanently run down, or exhausted; and considering the price paid by Russell, and the amount expended by Wing, his agent, during the sixteen months he managed the farm, we think the evidence shows that, though the fences and buildings were not in the best condition, yet their state was not such as to detract largely from the value of the property. The consideration for the alleged sale was \$2,000 in cash, and the assignment of two claims then in suit, amounting, with the interest computed thereon, to \$2,829.81, not finally reduced to money by Russell, till October, 1830, upwards of three years after the assignment. Making due allowance for the state of the currency in Kentucky at that time, the worst effects of which seem to have been then passing away, and which must be supposed to have affected somewhat the value of the claims he received, as well as of the property he conveyed, we cannot avoid the conclusion that this consideration was grossly inadequate; and therefore we must take along with us, in our investigations, the fact that

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there was no real proportion between the alleged price and the value of the property said to have been sold. We have not adverted particularly to the opinions of witnesses respecting the value of the property, because they have not great weight with the court, compared with the facts above indicated ; but there is a general concurrence of opinion that the value of the farm largely exceeded the alleged price.

It appears that Russell had intrusted the care of this farm to an agent named Wing, who had contracted debts for which Russell had been sued, on coming to Louisville from Alabama, where he resided. He was a stranger, without friends or resources there, except this farm, and in immediate and pressing want of about \$2,000 in cash. Southard, though not proved to have been a lender of money at usurious rates of interest, is shown to have been possessed of active capital, and not engaged in any business except its management. Russell certainly attempted to sell the farm. Colonel Woolley testifies: "Russell * was anxious to sell ; indeed, he was [* 150] importunate that I should purchase." And a letter is produced by the defendant, D. R. Southard, written to James Southard, by Wing, containing a proposal for a sale. The letter is as follows :—

"Sunday, Noon.

"SIR. Having had some conversation in relation to Col. Russell's plantation, I will take the liberty of submitting for your consideration, first, how much you will give for the place, crops, stock, utensils, and implements, or how much without the same, to be paid as follows : in one sixth cash in hand, the balance in one, two, three, four, and five equal annual instalments, which may be extinguished at any time, with whiskey, pork, bacon, flour, hemp, bale rope, cotton bagging, at the New Orleans prices current, deducting therefrom freight accustomary. Mules and fine horses will now be taken at appraised valuation. Respectfully, yours, J. W. WING.

"MR. SOUTHARD.

"N. B. Please leave an answer for me at Allan's, say this evening. Yours, &c. J. W. W."

It does not appear that any price was spoken of between Russell and Colonel Woolley, who peremptorily refused to purchase ; nor is any sum of money mentioned in this letter of Wing ; but, bearing in mind Russell's necessity to have \$2,000 in cash, the offer to take one sixth cash, and the balance in one, two, three, four, and five annual instalments, indicates that Russell then expected about \$12,000 for the property, and had that sum in view as the price, when these

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terms were proposed. This offer to sell differs so widely from the terms of the written memorandum, that it certainly does not aid in showing that the actual transaction was a sale. Peter Wood testifies that he heard a conversation between James Southard and Colonel Russell, about the transfer of the farm from Russell to Southard, in which Mr. Southard proposed to advance money to Russell upon the farm; that Russell told Southard about what he had paid for the farm, \$13,000 or \$14,000, and that he should consider it a sacrifice at \$10,000; but no proposal was made to give, or take, any price for the farm. That some time after, Southard told him he had advanced Russell between \$4,000 and \$5,000 on the place, but that, in case he owned the place, it would cost him \$10,000. The general character of this witness for truth and veracity is attacked by the defendants, and supported by the plaintiff. His credibility finds support in the consistency of his statements with the prominent facts proved in the case. This is all the proof touching the negotiations which led to the contract; but there is some evidence bearing [*151] directly on the real understanding of the parties. Doctor Johnston was the subscribing witness to the written memorandum. He testifies that "James Southard and Gilbert C. Russell, I think on the same day, presented the agreement, and asked me to witness the same, which I did. My understanding of the contract was both from Southard and Russell, and my distinct impression is, that Russell was to pay the money in four months, and take back the farm." The intelligence and accuracy, as well as the fairness of this witness, are not controverted; and if he is believed, the transaction was a loan of money, upon the security of his farm. It is the opinion of the court that such was the real transaction. The amount and nature of what was advanced, compared with the value of the farm, the testimony of Wood as to the offer of Southard to make an advance of money on the farm, and his subsequent declaration that he had done so, and the information given by both parties to Doctor Johnston, that Russell was to pay the money at the end of four months, present a case of a loan on security, and are not overcome by the answer of Southard and the written memorandum.

It is true, Daniel R. Southard, answering, as he declares, from personal knowledge, sets out, with great minuteness, a case of an absolute and unconditional sale; the written contract by his brother to reconvey being, as he says, a mere gratuity conferred on Russell the next day, or the next but one, after this absolute sale and conveyance had been fully completed. But this account of the transaction is so completely overthrown by the proofs, that it was properly abandoned by the defendants' counsel, as not maintainable. We entertain

grave doubts whether, after relying on an absolute sale in his answer, it is open to him to set up in defence a conditional sale; but it cannot be doubted, that the least effect justly attributable to such a departure from the facts, is to deprive his answer of all weight, as evidence, on this part of the case.

In respect to the written memorandum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point, as to make it apparent that the draftsman considered he had a somewhat difficult task to perform. But it is not to be forgotten, that the same language which truly describes a real sale, may also be employed to cut off the right of redemption, in case of a loan on security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids; and that, in doubtful cases, the court leans to the conclusion that the reality was a mortgage, and not a sale. *Conway v. Alexander*, 7 Cranch, 218; **Flagg v. Mann*, 2 Sumner, 533; *Secrest v.* [* 152] *Turner*, 2 J. J. Marsh. 471; *Edrington v. Harper*, 3 J. J. Marsh. 354; *Crane v. Bonnell*, 1 Green, Ch. R. 264; *Robertson v. Campbell*, 2 Call, 421; *Poindexter v. McCannon*, 1 Dev. Eq. Cas. 373.

It is true, Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of the parties. "Necessitous men," says the Lord Chancellor, in *Vernon v. Bethell*, 2 Eden, 113, "are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them."

The memorandum does not contain any promise by Russell to repay the money, and no personal security was taken; but it is settled that this circumstance does not make the conveyance less effectual as a mortgage. *Floyer v. Lavington*. 1 P. Wms. 268; *Lawley v. Hooper*, 3 Atk. 278; *Scott v. Fields*, 7 Watts, 360; *Flagg v. Mann*, 2 Sumner, 533; *Ancaster v. Mayer*, 1 Bro. C. C. 464. And consequently it is not only entirely consistent with the conclusion that a mortgage was intended, but in a case where it was the design of one of the parties to clothe the transaction with the forms of a sale, in order to cut off the right of redemption, it is not to be expected that the party would, by taking personal security, effectually defeat his own attempt to avoid the appearance of a loan.

It has been made a question, indeed, whether the absence of the personal liability of the grantor to repay the money, be a conclusive test to determine whether the conveyance was a mortgage. In *Brown v. Dewey*, 1 Sandf. Ch. R. 56, the cases are reviewed and the result arrived at, that it is not conclusive. It has also been maintained that the proviso, or condition, if not restrained by words showing that the grantor had an option to pay or not, might constitute the grantee a creditor. *Ancaster v. Mayer*, 1 Bro. C. C. 464; 2 Greenl. Cruise, 82 n, 3. But we do not think it necessary to determine either of these questions; because we are of opinion that in this case there is sufficient evidence that the relation of debtor and creditor was actually created, and that the written memorandum ascertains the amount of the debt, though it contains no promise to pay it. In such a case it is settled, that an action of *assumpsit* will lie. *Tilson v. Warwick Gas-Light Co.* 4 B. & C. 968; *Yates v. Aston*, 4 Ad. & El. N. S. 182; *Burnett v. Lynch*, 5 B. & C. 589; *Elder v. Rouse*, 15 Wend. 218.

[* 153] * Some reliance was placed on the facts, that in August, 1830, the plaintiff wrote a letter to his wife requesting her to release her dower, and that, in October, 1830, Russell surrendered the written memorandum, under circumstances which will be presently stated. It is urged that these acts show he understood the original transaction was not a mortgage. But the utmost effect justly attributable to these acts is, that Russell thought he then had no further claim to the property, and this belief may as well have arisen from the terms of the memorandum, as from his knowledge that a sale was intended. In our judgment, however, these acts, taken in connection with other facts proved, do not tend to support the defendants' case. Russell had, by his written contract to procure the release of his wife's dower, subjected himself to pay liquidated damages to the extent of three thousand dollars; and he might desire to escape from this liability by having his wife release her right, even if he then believed he had a right to redeem and expected to redeem; for, in that event, such release could do neither him nor his wife any harm. But, on the other hand, if he then thought he had no such right, it would be a balancing of disadvantages to have such a release made, and the question would be, whether the right of dower was more important than the liability to damages. And, as to the surrender of the written memorandum in October following, it appears, from the testimony of Colonel Woolley, that Russell, even after this surrender, thought he had a just right of redemption, though he undoubtedly believed that it was greatly embarrassed, if not lost, by his failure to pay on the stipulated day and by his relinquishment of the written memorandum.

* The conclusion at which we have arrived on this part of the case is, that the transaction was, in substance, a loan of money upon the security of the farm, and being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage.

Being of opinion that this was in its origin a mortgage, the next inquiry is, whether the right of redemption has been extinguished. In October, 1830, Russell was temporarily in Louisville, and, while there, called on Southard, and informed him there was a mistake of one hundred dollars in the computation of the amount due on the claims assigned to him. Southard insisted it was the mistake of W. Pope, who, he said, was Russell's agent, and that he, Southard, was not liable to make it good. He also set up a claim that he had a right to redeem, or, as D. R. Southard says, re-purchase the farm. This, also, Southard denied. It does not appear, from any proofs, what further negotiations, if any, took place between the parties; but *the result was, that, on the payment by [* 154] Southard of one hundred dollars, Russell wrote and signed the following receipt on the back of the written memorandum, which he surrendered to Southard:—

“Received, 6th Oct., 1830, of James Southard, by the hand of Daniel Southard, one hundred dollars, which makes the two debts of Brown and Johnston, with the \$2,000, amount to the sum of \$4,920.81; and nothing but the act of God shall prevent the relinquishment of dower of Mrs. Russell being deposited in the clerk's office by the 1st of January next. This is in full of all demands upon J. Southard.

(Signed)

GILBERT C. RUSSELL.” [Seal]

A mortgagee in possession may take a release of the equity of redemption. *Hicks v. Cook*, 4 Dow, P. C. 16; *Hicks v. Hicks et al.* 5 Gill & Johns. 85. But such a transaction is to be scrutinized, to see whether any undue advantage has been taken of the mortgagor. Especially is this necessary when the mortgagee, in the inception and throughout the whole conduct of the business, has shown himself ready and skilful to take advantage of the necessities of the borrower. Strong language is used in some of the cases on this subject. It was declared by Lord Redesdale, in *Webb v. Rorke*, 2 Sch. & Lef. 673, that “courts view transactions of that sort between mortgagor and mortgagee with considerable jealousy, and will set aside sales of the equity of redemption, where, by the influence of his incumbrance, the mortgagee has purchased for less than others

would have given." And Chancellor Kent, in *Holdridge v. Gillespie*, 2 Johns. Ch. R. 34, says, "the fairness and the value must distinctly appear." *Wrixon v. Cotter*, 1 Ridg. 295; *St. John v. Turner*, 2 Vern. 418. But strong expressions, used with reference to the particular facts under consideration, however often repeated by subsequent writers, cannot safely be taken as fixing an abstract rule. We think that, inasmuch as the mortgagee in possession may exercise an undue influence over the mortgagor, especially, if the latter be in needy circumstances, the purchase by the former of the equity of redemption, is to be carefully scrutinized, when fraud is charged; and that only constructive fraud, or an unconscientious advantage which ought not to be retained, need be shown, to avoid such a purchase. But we are unwilling to lay down a rule which would be likely to prevent any prudent mortgagee in possession, however fair his intentions may be, from purchasing the property, by making the validity of the purchase depend on his ability afterwards to show that he paid for the property, all that any one would have been [* 155] willing to give. * We do not deem it for the benefit of mortgagors that such a rule should exist.

In this case it is unnecessary to rely on such a rule. For by his own showing, in his answer, it is clear that Daniel R. Southard, as the agent of his brother, either paid no consideration whatever for the extinguishment of the equity, or at the utmost only \$100. We think nothing was paid for it; and that the surrender of this right, claimed by Russell and denied by Southard, was insisted on as a condition for the correction of an actual mistake, which Southard was justly obliged to correct, without any condition; and we do not hesitate to declare, that a release of this equity, obtained by the mortgagee in possession, under a denial by him of the existence of the right to redeem, for no consideration at all, or as a condition for the correction of a mistake which in equity he was bound to correct, the written defeasance having been purposely so prepared as apparently to cut off the right of redemption prior to the time when the equity was released, cannot stand in a court of equity.

Indeed, if it were not for Russell's subsequent acquiescence, of which we shall speak hereafter, the question would not admit of a moment's doubt. Though this acquiescence is not without effect upon the complainant's rights, as will presently be seen, yet we do not think that, under the special circumstances, it ought to operate as a bar, to prevent redemption. The absence of all valuable consideration for the surrender of the equity, and the circumstances of distress under which it was made, and which, so far as appears, continued to exist down to the filing of the bill, coupled with the convic-

tion, which we think Russell mistakenly entertained, that his rights were probably destroyed, must prevent us from allowing the lapse of time to be a positive bar.

The inquiry then arises, on what terms is the redemption to be decreed.

An account of the rents and profits is ordinarily an incident to a decree for redemption against a mortgagee in possession. But it is not an inseparable incident. This right to an account may be extinguished by a release, or an accord and satisfaction, or it may be barred by such neglect of the mortgagor to assert his claim, as renders it unfair for him to insist on an account extending over the whole period of possession, and unjust towards the mortgagee to order such an account. A mortgagee in possession is deemed by a court of equity a trustee; but there is no other than a constructive trust, raised by implication, for the purpose of a remedy, to prevent injustice; *Kane v. Bloodgood*, 7 Johns. Ch. R. 111; and it would be contrary to the fundamental principles of equity, to imply a trust, the execution of *which might work injustice. And [* 156] accordingly it will be found, that in such cases, courts of equity have refused to order accounts against *quasi* trustees.

Thus, in *Dormer v. Fortescue*, 3 Atk. 130, Lord Hardwicke, speaking of the case of an heir in possession under a legal title, which he is obliged by a decree to surrender to one having an equitable title, says, the court will order an account from the time the title accrued, unless upon special circumstances; as "when there hath been any default, or laches, in the plaintiff, in not asserting his title sooner, but he has lain by, there the court has often thought fit to restrain it to the filing of the bill." So in *Pettward v. Prescott*, 7 Ves. 541, a case of constructive trust, Sir William Grant restrained the account of the rents and profits to the time of filing the bill, on account of the lapse of nearly twenty years; and similar cases may be found referred to in *Drummond v. The Duke of St. Albans*, 5 Ves. 433, and note 3 to page 439; and in *Roosevelt v. Post*, 1 Ed. Ch. R. 579. Indeed, in *Acherly v. Roe*, 5 Ves. 565, where there was a trust created of a term, for the purpose of raising a sum of money, and the *cestui que trust* had been long in possession without objection, Lord Chancellor Loughborough refused even to carry the account back to the filing of the bill, upon the special circumstances of that case. This court, in *Green v. Biddle*, 8 Wheat. 78, gave its sanction to the rule as laid down by Lord Hardwicke, and declared it to be fully supported by the authorities.

This bill was filed after the lapse of nineteen years and eight months from the time the loan became payable. James Southard,

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the original mortgagee, had then been dead many years. More than sixteen years had elapsed since the defeasance was surrendered; and though we are satisfied Russell was under great embarrassments, and though we are of opinion he himself believed his right to redeem was probably extinguished by the terms of the defeasance, and its surrender, yet his neglect to look into and assert his rights, must not be allowed to subject the defendants to the risk of injustice. The defendants, and James Southard, have treated the property as their own, and have improved its condition. There is no suggestion of waste in the bill. The value of the land has greatly appreciated, from the growth of the neighboring city; and though we think James Southard designed to take an unconscientious advantage of Russell, and that the defendant, R. R. Southard, obtained the surrender of the defeasance, under such circumstances as rendered it constructively fraudulent, yet neither of them appears to have concealed any facts from Russell, or to have done any thing to prevent him from exhibiting his real case to counsel. To such a case, the language

[* 157] of the vice-chancellor, in *Bowes v. East London* * W. W. Co. 3 Mad. 384, exactly applies. "The plaintiff ought to have looked into his rights; and as by his negligence to obtain information concerning them and to assert them, the lessees may have been led to expenditure on the premises, the benefits of which they will lose, I shall not direct an account beyond the filing of the bill." To this extent his acquiescence must be taken to have concluded his right, and we shall direct that the account of the interest due upon the money loaned, and of the rents and profits of the farm, commence at the date of the filing of the bill.

We can perceive no ground for charging Southard with the money received from the insurance company, on account of the destruction of the house. He was in possession, claiming to be the absolute owner of the farm and its appurtenances. He obtained the policy to cover his interest, and paid the premium. If there were any equities against him arising out of the receipt of this money, they would be in favor of the underwriters, and not of the mortgagor. *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 501.

It remains only to advert to the cases of the defendants, who claim as purchasers under D. R. Southard. The questions arising therein were not argued by counsel, and upon looking into that part of the record, we find some of them not capable of being fully settled upon the facts therein disclosed.

It was probably understood by counsel, that these questions would remain for consideration, in the court below, if the case should be remanded.

Samuel D. Tompkins claims to have been a purchaser for valuable consideration of thirty acres of this land, and to have received a deed of conveyance thereof, and paid a part of the consideration-money without notice of Russell's title, and before the institution of this suit. He also claims to have made permanent and valuable improvements on the land purchased by him, but whether before or since the institution of this suit does not appear. William H. Pope, as the executor and trustee of his father, William Pope, claims that his father in his lifetime, purchased at a sale on four executions against Southard another part of these lands, and that Southard omitted to redeem the land by paying what was due on three of the executions, and a suit is shown by the record to be pending in the court of appeals of Kentucky, wherein Russell's right to redeem is in contestation.

Matilda Burks, the widow of James Burks, deceased, and John Burks, one of the sons of James, and William L. Thompson, as guardian of other children of James, and James Guthrie, assignee of J. R. Trunshall, the husband of a daughter of James, 'claim a lien on these lands by virtue of a mortgage thereof [* 158] executed by Daniel R. Southard, and Southard insists that Guthrie has been paid; it is not ascertained whether the debts intended to be secured on these lands, are or are not, fully secured upon other lands of Daniel R. Southard, which are embraced in the same mortgage. In this posture of the cause, it is not practicable for the court to pass finally upon the rights of these parties; and the cause will therefore be remanded, without deciding upon the existence or extent of the right of either of them as a purchaser.

A decree is to be entered, reversing the decree of the court below, with costs, declaring that the conveyance from Russell, the complainant, to James Southard, was a mortgage, and that Russell is entitled to redeem the same, and remanding the cause to the circuit court, with directions to proceed therein in conformity with the opinion of this court and as the principles of equity shall require.

After the opinion of the court was pronounced, a motion was made on behalf of the appellees for a rehearing, and to remand the cause to the circuit court for further preparation and proof, upon the ground that new and material evidence had been discovered since the case was heard and decided in that court.

Sundry affidavits were filed, showing the nature of the evidence which was said to have been discovered.

The opinion of the court upon this motion was delivered by Mr. Chief Justice TANEY.

The decree of the circuit court, in this case, was reversed during

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the present term, and a decree entered in favor of the appellant. * A motion is now made in behalf of Daniel R. Southard, one of the appellees, to set aside the decree in this court, and to remand the case to the circuit court for further preparation and proof, upon the ground that new and material evidence has been discovered since the case was heard and decided in that court. In support of this motion, affidavits have been filed stating the evidence newly discovered, and that it was unknown to him when the case was heard in the court below.

It is very clear that affidavits of newly discovered testimony cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting, as an appellate tribunal. And, according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal. *Eden v. Earl Bute*, 1 Bro. Par. Cas. 465; 3 Bro. Par. Cas. 546; *Studwell v. Palmer*, 5 Paige, 166.

Indeed, if the established chancery practice had been otherwise, the act of congress of March 3, 1803, expressly prohibits the introduction of new evidence, in this court, on the hearing of an appeal from a circuit court, except in admiralty and prize causes.

The motion is, therefore, overruled.

18 H. 268; 16 H. 547; 19 H. 289; 1 B. 488.

MOSES B. IVES, Plaintiff in Error, v. THE MERCHANTS BANK OF BOSTON.

12 H. 159.

An appeal-bond, conditioned that the obligors will pay all costs and damages which they may be adjudged to pay by reason of the appeal being broken, and the question of the extent of their liability submitted to the court on an agreed case, *held*, 1. That the proceeds of property attached in the suit were not to be applied *pro rata* to the original judgment and to the enhanced damages and costs by reason of the appeal, but that the former should be first fully paid; 2. That the equitable power of the court to reduce the penalty does not exist in a case submitted on an agreed statement of facts; 3. That as the whole amount of the penalty of the bond and interest thereon from the date of the writ in this suit, did not exceed what remained due to the obligee, after applying the proceeds of the property attached as above mentioned, the obligors were liable to a judgment for such penalty and interest.

THE case is stated in the opinion of the court.

Ames, for the plaintiff.

Tillinghast and Bradley, contra.

* CATRON, J., delivered the opinion of the court. [* 163]

At November term, 1843, in the circuit court of Rhode Island, the Merchants Bank of Boston recovered against the New Jersey Steam Navigation Company, by decree in an admiralty suit, the sum of \$22,224 and costs of suit. From which decree the respondents appealed to this court; and on December 14, 1843, Moses B. Ives, the present plaintiff in error, became bound as surety for the appellants in a penal bond of \$2,500, with a condition, "that the said Navigation Company should prosecute their appeal with effect, and should well and truly pay all such costs and damages as should be adjudged for them to pay by said supreme court, or by said circuit court, by reason of said appeal, in case of failure. At December term, 1847, the appeal was heard before the supreme court, and the decree affirmed, with costs and six per cent. damages. On return of the mandate, a judgment was entered in the circuit court against the Navigation Company, for the original amount; and also for \$6,078.20 damages, arising by reason of the appeal, and for \$529.98, being costs covered by the appeal bond. The entire sum for principal, damages, and costs, being \$28,452.78. Execution issued for the aggregate sum, and the steamboat Massachusetts was sold, 20th July, 1848, for \$25,000, by virtue of the writ. The vessel had been attached when the proceeding was commenced, and continued subject to a lien until sold; but, not bringing a sum equal to the final decree, Ives was sued on his appeal-bond, and the circuit court gave judgment against him for the amount of the penalty, and also for six per cent. interest on the \$2,500, from October 10, 1848, being the time when he was served with the writ; the penalty and interest amounting to \$2,605.80, for which judgment was rendered at the June term, 1849. To bring up this judgment, Ives sued out the present writ of error.

First, it is insisted, and assigned for error, that the \$25,000, made by a sale of the vessel, covered about eighty per cent. of the amount included in the execution, and ought to have been proportioned to every part of the demand, and if thus applied to damages and costs, would have reduced them to about \$1,200, and that plaintiff in error was responsible for no more.

Ives was bound to pay such damages as might be awarded by the supreme court, and costs; and could have been sued and a judgment had against him, had no execution issued. He was positively bound to the amount of his bond, and could not be heard to allege an extinguishment of it in part, because of a payment made by his principals, leaving an amount due equal to the bond.

This is the plain equity of the case. If the appeal had not

[* 164] *been taken, and the property attached had been sold in due time after the first decree for \$25,000, no damages would have been sustained by the plaintiffs below, and as the surety was instrumental in delaying satisfaction, it is equitable that he should respond to such damage as his act occasioned, and which enlarged the amount. The second ground relied on to reverse is, that by uniform practice costs are deducted from the first proceeds collected on an execution including them; and that a surety for costs is never held liable when an amount sufficient to cover costs is made of the principal.

It is not necessary at present to decide this matter of practice, nor shall we do so, as the unsatisfied damages, exclusive of costs, far exceeded the judgment rendered by the circuit court.

The third and remaining question is one of general importance and some difficulty. The surety was bound in a penal bond, and this penalty the circuit court exceeded, by allowing interest on it from the time of demand by suit; and it is insisted that in this there was error. The action was debt, with an allegation of damages sustained by its detention. The parties came to a hearing on an agreed case which set forth the facts, and submitted the law arising on them to the court; and, as the 26th section¹ of the judiciary act of 1789 only gives the courts power to assess damages and to render judgment for so much as is due according to equity, in cases of default or confession, or on demurrer, it does not apply in cases heard on agreed facts, or tried upon pleadings and proofs. This court so held in *Farrar and Brown v. The United States*, 5 Pet. 385, and which construction we follow. In the same cause it was adjudged that, in an action of debt against the sureties of a surveyor who had received moneys of the United States to disburse, and given bond with sureties to account for them, the practice was to render judgment in debt for the penalty, to be discharged by the amount actually due, and that this amount could not exceed the penalty.

In cases where unascertained damages are claimed, about which there is a contest, the foregoing is the proper rule; although it was departed from in the case of *M'Gill v. The Bank of The United States*, 12 Wheat. 514, where payments had been made by the sureties after a defalcation, and an account was taken between the parties, and interest calculated on both sides and a balance struck, which, when added to previous payments, exceeded the penalty of the bond. But these cases widely differ from the present. Here, the surety was bound to pay damages that might be adjudged against his principal in the supreme court. They were established and settled at

¹ 1 Stat. at Large, 87.

\$6,078,26; and this judgment bore six per cent. interest from its date. It was conclusive as against the principal; [* 165] and equally conclusive of the fact, that the surety was bound to pay it to the extent of \$2,500. Then this amount was due by the bond, which could have been at once enforced by suit; and if the supreme court had been vested with power to render judgment against the surety on the appeal bond, as is the case in some of the States, no reason would seem to exist, why the bond should not bear interest from the date of judgment in the supreme court against the surety as well as against the principal. But as Ives only guaranteed the payment of damages, and it was a duty imposed on the principal to pay the entire judgment, the moderate rule has been applied of requiring interest from the time that demand of payment was made by suit; a rule now so generally established in similar cases, by state courts of high authority, that this court could not violate it without manifest impropriety.

Of course, we are dealing with an appeal bond, and do not intend to go beyond the case before us. It is, therefore, ordered that the judgment rendered by the circuit court be affirmed.

THE GRAND GULF RAILROAD AND BANKING COMPANY, and ALFRED INGRAHAM and GEORGE READ, Assignees of said Company, Intervenor, Plaintiffs in Error, v. JOHN R. MARSHALL.

12 H. 165.

In Louisiana, the opinion of the court is entered of record, and shows on what principles the case was decided, and if it does not appear from the opinion, or otherwise on the record, that some question described in the 25th section of the judiciary act of 1789, (1 Stats. at Large, 85,) was decided against the plaintiff in error, this court has not jurisdiction of a writ of error to the state court.

THE case is stated in the opinion of the court.

Strawbridge, for the plaintiff.

No counsel *contra*.

* TANEY, C. J., delivered the opinion of the court. [* 166]

This is a writ of error to the supreme court of the State of Louisiana.

The Grand Gulf Railroad and Banking Company was chartered by the State of Mississippi in the year 1833. In 1840, an act was passed by the legislature of that State declaring that it should not be lawful for any bank in Mississippi to transfer, by indorsement or otherwise, any note, bill receivable, or other debt. And in 1842, after

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the passage of this act, the bank having become insolvent and its notes greatly depreciated, assigned and transferred all of its notes, bills receivable, and other assets of any value to John Lindsey and Alfred Ingraham, in trust for the payment of its debts, in the order specified in the deed.

Some of the debtors of the bank, whose notes and mortgages were included in this transfer, resided in the State of Louisiana. And in 1843, John R. Marshall, the defendant in error, being the holder of the notes of the bank payable to bearer to the amount of \$5,400, obtained an attachment from one of the district courts of Louisiana against the property and credits of the bank, and laid it in the hands of these debtors as garnishees. The bank appeared and answered, and averred that the debts and property in question had been transferred to the trustees above named previous to the attachment; and the trustees intervened and claimed the debts and property as belonging to them by virtue of the assignment of the bank.

The defendant in error replied that the assignment was null and void by the laws of Mississippi and the laws of Louisiana, and that it was without consideration and in fraud of the creditors.

Testimony was taken on both sides to show the object of the assignment, and the circumstances under which it was made; and several questions of law were raised in the district court upon the admissibility of testimony and upon the manner in which the deed to the trustees had been executed. But it is unnecessary to state either the testimony or the questions raised at the trial, because neither the proofs nor the points made can have any bearing upon the question upon which the case must be decided in this court.

[* 167] * The district court gave judgment in favor of the defendant in error, from which the bank and trustees appealed to the supreme court of the State where the judgment of the district court was affirmed. And this writ of error is brought under the 25th section of the act of 1789, to revise that judgment.

The plaintiffs in error claim jurisdiction for this court upon the ground that the assignment by the bank to the trustees was adjudged to be void by the state court under the act of the State of Mississippi of 1840, hereinbefore mentioned; and that this act is a violation of the charter granted to the bank, and impairs the obligation of the contract which the charter created between the State and the corporation.

If the record brought that question before us, undoubtedly we should have jurisdiction, and the judgment of the state court could not be maintained. For it is the same question which this court decided in the case of *The Planters Bank of Mississippi v. Sharp*, 6

How. 301, and in Baldwin and others v. Payne and others, 6 How 332.

But in order to give this court jurisdiction, the record must show, that the point was brought to the attention of the state court and decided by it. It is not sufficient that the point was in the case, and might have been raised and decided. It must appear that the validity of the state law was drawn in question and the judgment founded upon its validity. This is evidently the meaning of the 25th section of the act of 1789, which gives the writ of error. And the reason is obvious. The party is authorized to bring his case before this court, because a state court has refused to him a right to which he is entitled, under the constitution or laws of the United States. But if he omits to claim it in the state court, there is no reason for permitting him to harass the adverse party by a writ of error to this court, when, for any thing that appears in the record, the judgment of the state court might have been in his favor if its attention had been drawn to the question. The rule upon this subject is distinctly stated, in the case of *Armstrong and others v. The Treasurer of Athens County*, 16 Pet. 285, where the court said, that when the proceeding is under the law of Louisiana, it must be shown that the point arose and was decided, either by the statement of facts, and the decision as usually set out in such cases by the court, or it must be entered on the record of the proceedings in the appellate court, (in cases where the record shows that such a point may have arisen and been decided,) that it was in fact raised and decided. In suits at common law, the question is usually presented by the pleadings or by an exception to the opinion of the court.

In the case before us the proceedings were under the Louisiana law. And the opinion of the court, according to [* 168] the practice in that State, is entered on the record, and sets forth the principles of law upon which the decision was made. And it appears that the decision turned upon the construction (not the validity) of the act of Mississippi of 1840; and upon a question of merely local law, concerning the right by prescription claimed by the trustees.

Nothing is said in relation to the constitutionality or validity of this act of Mississippi, and the opinion of the court clearly shows that no such question was raised or decided.

This writ of error must, therefore, be dismissed for want of jurisdiction.

Bein v. Heath. 12 H.

MARY BEIN, and RICHARD BEIN, her Husband, G. S. HAWKINS, and
JAMES M'MASTERS, Plaintiffs in Error, v. MARY HEATH.

12 H. 168.

An injunction bond in Louisiana, was conditioned to pay "all such damages as the obligee may recover against us," this being the usual form under the state practice, where if the injunction is dissolved, the court proceeds to assess the damages and decrees their payment by the principal and sureties in such a bond. *Held*, 1. That state practice was inapplicable to a case in equity. 2. That no decree could be made against the sureties. 3. That as none had been made, the condition of the bond was not broken, and no action at law would lie thereon.

THE case is stated in the opinion of the court.

Coxe, for the appellant.

Bradley, contra.

[* 176] * TANEY, C. J., delivered the opinion of the court.

This is an action on an injunction bond given by Mary Bein, one of the plaintiffs in error in a suit in equity in the circuit court of the United States for the eastern district of Louisiana, in which Bein and wife were complainants, and Mary Heath, the present defendant in error, the respondent.

It appears that Mary Bein executed certain promissory notes for the payment of a large sum of money, and mortgaged her separate and individual property to secure the debt. These notes and the mortgage, became the property of Mary Heath, as the legal representative of Sherman Heath, who loaned the money for which they were given, and who died before any proceedings were instituted to recover it.

[* 177] * The notes not being paid, Mary Heath obtained a writ for the seizure and sale of the mortgaged premises, according to the laws of Louisiana. And Bein and wife thereupon filed their bill in the circuit court of the United States, setting forth that the separate property of Mary Bein, which had been seized, was not legally or equitably chargeable with the payment of this debt, and praying an injunction to stay the sale. It is unnecessary to state the grounds on which the complainants asked relief, as the merits of that controversy are not involved in the present suit. The court passed the order directing the injunction to issue, as prayed, upon the complainants giving a bond, with certain sureties named in the order, to answer all damages which the defendant in that suit might sustain in consequence of said injunction being granted, should the same be thereafter dissolved.

The bond was given in the penalty, and with the sureties, mentioned in the order. But, instead of making the condition such as the court had directed, which was the proper one, according to established chancery practice, the complainants adopted, we presume, the form used in the state courts of Louisiana, in cases where the law requires an injunction bond to stay execution on a judgment or order of seizure and sale. The condition is as follows:—

“ Now, the condition of the above obligation is, that we, the above bounden Mary Bein, and Gilbert S. Hawkins, (and) James McMassters, sureties, will well and truly pay, to the said Mary Heath, the defendant in said injunction, and plaintiff in said case of seizure and sale, all such damages as she may recover against us, in case it should be decided that the said injunction was wrongfully obtained.”

The injunction, however, was issued by the clerk upon the filing of this bond. And the suit proceeded to final hearing, when the court passed the following decree:—

“ This cause came on for trial on the 29th day of May, 1844, and was argued by counsel; wherefore, in consideration of the law and the evidence, and the rules and principles of equity being in favor of the respondent, Mary Heath, it is ordered, adjudged, and decreed, that the complainant be dismissed with costs. And it is further ordered, adjudged, and decreed, that the injunction, granted in this case, be dissolved, and the respondent be allowed to proceed with the writ of seizure and sale granted, in accordance with the prayer of her original petition.”

The complainants appealed to this court, and, after argument by counsel, the decree of the circuit court was affirmed, with costs. And, thereupon, the present defendant in error brought
* the suit which is now before us, upon the injunction bond [* 178] hereinbefore stated, to recover certain damages stated in her petition, for which she alleges the obligors in that bond are liable. The suit is by petition, in the usual form of Louisiana practice, and the judgment of the circuit court being in favor of the plaintiff in that suit, the plaintiffs in error, who were defendants in the court below, have brought the case before this court.

It appears, from the exceptions, and the judgment in the case, that the circuit court regarded this bond as the same in principle with the bond required by the laws of Louisiana, where an injunction is obtained to stay execution upon an order for the seizure and sale of mortgaged property; and therefore considered this bond as creating the same obligations and giving the same rights to parties as if it had been given under the laws of the State. And by these laws, when the party obtains an injunction, and fails to support it at the

trial, judgment is given against him and his sureties for the debt, interest, and damages, at the time the injunction is dissolved, and it forms part of the same judgment. 8 Rob. 20. The sureties in the bond are treated as parties to the suit; and the amount of interest and damages which the court may award by their judgment is regulated by the laws of the State. It is with reference to this mode of proceeding that the injunction bond in question appears to have been framed; and it is to this judgment, as prescribed by the laws of the State, that the condition must refer, when it binds the obligors to pay all such damages the obligee might recover against them, in case it should be decided that the injunction was wrongfully obtained. There must be a recovery, that is, a judgment against them, before the condition is broken, and before any proceeding could be had upon the bond.

Now, there is manifest error in subjecting the parties to an injunction bond, given in a proceeding in equity in a court of the United States, to the laws of the State. The proceeding in a circuit court of the United States in equity is regulated by the laws of congress, and the rules of this court made under the authority of an act of congress. And the 90th rule declares that, when not otherwise directed, the practice of the high court of chancery in England, shall be followed. The 8th rule authorizes the circuit court, both judges concurring, to modify the process and practice in their respective districts. But this applies only to forms of proceeding and mode of practice, and certainly would not authorize the adoption of the Louisiana law, defining the rights and obligations of parties to an injunction bond. Nor do we suppose any such rule has been adopted by the court. And if it has, it is unauthorized by law, and cannot regulate the rights or obligations of the parties.

[* 179] * And when an injunction is applied for in the circuit court of the United States sitting in Louisiana, the court grant it or not, according to the established principles of equity, and not according to the laws and practice of the State in which there is no court of chancery, as contradistinguished from a court of common law. And they require a bond, or not, from the complainant, with sureties, before the injunction issues, as the court, in the exercise of a sound discretion may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

In proceeding upon such a bond, the court would have no author-

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ity to apply to it the legislative provisions of the State. The obligors would be answerable for any damage or cost which the adverse party sustained, by reason of the injunction, from the time it was issued until it was dissolved, but to nothing more. They would certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost by the delay, nor for the fees paid to the counsel for conducting the suit.

But the bond, in the case before us, is not one to pay the damages which the opposing party should sustain by reason of the injunction, but it is to pay the damages that might be recovered against them; obviously referring, we think, to the practice in Louisiana above mentioned. A court proceeding, according to the rules of equity, cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction. This was done by the circuit court in the former suit between the parties. No judgment was or could be given against the obligors for debt or damages, and none were recovered against them previously to the institution of this suit. The contingency on which they agreed to pay, has not, therefore, happened, and the condition of the bond is not broken, and consequently no action can be maintained upon it. It would be against the well-established rule of the chancery court to extend the liability of the surety, by any equitable construction, beyond the terms of this contract. And, in a proceeding upon a bond, the liability of the principal obligor cannot be extended beyond that of the surety.

In this view of the case, it is unnecessary to examine the questions which have been raised as to the Louisiana * laws [* 180] in relation to injunction bonds. The judgment of the circuit court must be reversed, and a *venire de novo* awarded.

PELEG WILBUR, Appellant, v. SAMSON ALMY.

12 H. 180.

Trustees to sell must unite in the sale and conveyance to pass any title to property held by them jointly.

A bill to foreclose an equitable mortgage on machinery, cannot be maintained by an assignee who took the assignment only to secure a debt which has been paid.

THE case is stated in the opinion of the court.

Rockwell and Johnson, for the appellant.

Bradley, contra.

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[* 189] * CURTIS, J., delivered the opinion of the court.

Samson Almy filed his bill in the circuit court of the United States for the district of Rhode Island, stating that one Christopher Lippitt, on the 7th day of March, 1828, entered into a contract in writing with Hazard and Co., the effect of which was to create an equitable mortgage on certain machinery for the price thereof advanced by Hazard and Co., who were to supply Lippitt with cotton, receive and sell the cloth, allow him three and a half cents per yard

for manufacturing, and credit half the profits towards paying [* 190] for the machinery, retaining the other * half for their own services and the interest on the cost of the machinery. The bill further states, that in May, 1829, Hazard and Co. failed in business, and transferred all their property to Thomas R. Hazard and Charles Low, in trust for the benefit of their creditors; and that on the 9th of March, 1830, the complainant purchased of the assignees their interest under the contract with Lippitt, by a written instrument of sale, of that date, a copy of which, annexed to the bill, is as follows :—

The assignees of R. G. Hazard and Co. hereby sell and convey, to Samson Almy, the right, title, and interest which they have to a certain contract with Christopher Lippitt, bearing date March (3d mo.) 7, 1828, (a copy of which is hereunto annexed,) together with the balance due from said Lippitt on account of payment for machinery, as expressed in said contract; also their right, title, and interest, to the machinery held as collateral security for the said balance due from said C. Lippitt agreeable to the aforesaid contract, a schedule of which is hereto annexed, for which Samson Almy agrees to pay them (the said assignees) or account with them for the sum of five thousand dollars; and it is further agreed, that if Low and Fenner should redeem their one half of the aforesaid contract by the payment of the drafts drawn upon them by R. G. Hazard and Co. on account thereof, and to return one half of the aforesaid five thousand dollars to said Samson Almy, he relinquishing to said Low and Fenner all claims upon the aforesaid one half part of the said contract.

Providence, 3d month 9th, 1830,

For assignees of R. G. Hazard and Co.

R. G. HAZARD,

R. G. HAZARD AND Co.,

SAMSON ALMY.

Witness : A. E. Forbush.

Whereas, R. G. Hazard, for the assignees of R. G. Hazard and Co., has made an agreement with Samson Almy, bearing date 3d month 9th, 1830, relative to contract existing between Christopher

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Lippitt and R. G. Hazard and Co., dated March 7, 1828, and of the machinery held by them as collateral security, by debts due from Christopher Lippitt and drafts drawn on Low and Fenner, I hereby ratify and confirm the above agreements the same as if made by myself as assignee of R. G. Hazard and Co.

South Kingston, 3d month 10th, 1839.

THOMAS R. HAZARD, Assignee.

Witness: Robert Rathbone.

The bill further states, that from the time of the failure of Hazard and Co. till his purchase from the assignees, the complainant supplied Lippitt with cotton, pursuant to the *original [* 191] contract between Hazard and Co. and Lippitt, having agreed with the assignees so to do; that after his purchase from the assignees, he continued to supply cotton to Lippitt, till September, 1832, when Lippitt refused to receive more; that in August, 1831, he also furnished to Lippitt a speeder, which cost five hundred and fifty dollars; that in September, 1832, when Lippitt ceased to receive cotton from him, there was due upon the mortgage the sum of \$5,405¹³/₁₀₀, for which sum he then had a lien on the machinery; that Lippitt transferred the machinery to Wilbur, the defendant, with notice of the complainant's rights, and after the complainant had demanded the machinery of Wilbur, the latter sold it and refuses to account. The bill prays for an account of the value of the machinery, and that Wilbur may be decreed to pay to the complainant, out of the sum found to be its value, the money due upon the mortgage, including the amount of the advance made by the complainant to purchase the speeder.

The cause was heard in the circuit court, on the bill, answer, and evidence, and a final decree made in favor of the complainant; and thereupon the respondent appealed to this court.

The title of the complainant, as a purchaser from the assignees of Hazard and Co., not being admitted in the answer, it is obvious that proof of the assignment to him is indispensable. The bill alleges it to have been made by the written instrument, a copy of which has been given. By reference thereto, it appears to have been executed by R. G. Hazard, for the assignees. R. G. Hazard is examined as a witness by the complainant, but does not state that he had any authority from the assignees to act for them in this behalf, nor is there any evidence of such authority in the record.

His act is ratified in writing by Thomas R. Hazard, one of the assignees. This is not sufficient. Trustees must unite to pass any title to property jointly held by them. *Ex parte Rigby*, 19 Ves. 463;

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Sinclair v. Jackson, 8 Cowen, 543-583; Kirby v. Turner, 1 Hopkins, 309; 2 Story's Eq. § 1280; Willis on Trustees, 136. The previous authority or subsequent assent of Low must be shown.

It is urged that, though Low, the other assignee, did not sign the paper, nor ratify Hazard's act, by any writing, he did, by acts *in pais*.

There are reasons why very clear proof of such ratification should be required in this case. The first is, that the bill itself states no such ratification. It relies on the written paper alone, and does not suggest that after the execution of the paper, one of the assignees ratified the transfer, by acts *in pais*. But another, and more [* 192] important reason, is, that this transaction * between Almy and R. G. Hazard, who undertook to act for the assignees, was not in accordance with the trusts, on which the assignees held the property. The nominal consideration of the transfer to Almy was \$5,000; the real consideration was a debt due to Almy from Hazard and Co. at the time they became insolvent, and the purpose of the transfer to Almy was to prefer that debt. This, neither Hazard and Co. nor the assignees, had a right to do. And the proof should be very clear, to induce the court to declare that a trustee has ratified, or acquiesced in, a breach of his trust, amounting to a fraud on the other creditors of Hazard and Co., whose rights he was bound to protect. We do not find such proof in the record. There is no evidence tending to show that Low was ever informed of the true nature of the transaction between R. G. Hazard and Almy, or had knowledge that the purpose of those parties was to give a preference to Almy's claim. And, consequently, if he had acquiesced in or even expressly ratified the transfer, while ignorant of its real character, it would have been open to him afterwards to have disaffirmed it. But it is not shown that Low did acquiesce in, or ratify the act of R. G. Hazard. The complainant put in evidence certain letters from Low to Lippitt, which have an important bearing on this part of the case. They are as follows:—

Providence, 6th February, 1832.

Dear Sir: Yours, dated four days since, is just at hand. Contents noted. With regard to the contract, I am as desirous to have it adjusted as you, and am ready to attend to it at any time you may name. It will be necessary for you to take an account of what cotton, yarn, cloth, &c., you have on hand. You stated that Mr. Hazard informed you that he had purchased the contract of the assignees. That is not the case. I have made no disposition of it.

CHARLES LOW, Assignee.

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"Providence, October 26, 1832.

"Mr. Christopher Lippitt, Sir: Having been notified by you that you wish to close up the contract under which you have been manufacturing, and to take the machinery, you paying the deficiency of your half of the profits, you are hereby authorized and requested not to receive any more cotton from Samson Almy to manufacture under said contract, and to manufacture what cotton you have on hand as soon as practicable. You are requested also to render your accounts as soon as practicable, and we will have the accounts of the profits prepared as soon as practicable, with a view to a prompt and final settlement of the whole business.

"Mr. Almy was never authorized to supply you with cotton under the contract for his own account.

Respectfully, your obedient servant,

CHARLES LOW, *for self and*
T. R. Hazard, assignee for R. G. Hazard and Co."

"Providence, Nov. 13, 1832.

"Dear Sir: I should like to know if you are furnishing yourself with cotton, and not receiving it from Mr. Almy, as you have been heretofore. As for Rowland Hazard being my agent for settling the business, he cannot produce any thing to show that I ever empowered him to act for me in any one instance. I shall call upon Mr. Almy within a few days and ask him for a settlement.

Yours, &c.,

CHARLES LOW, *Assignee for*
R. G. Hazard and Co."

In these letters, Low not only denies R. G. Hazard's agency, but Almy's right to supply cotton on his own account, and declares, in so many words, that he has made no disposition of the contract which created the mortgage; and Mr. Lippitt testifies that Low always told him R. G. Hazard never was appointed the agent of the assignees, and had nothing to do with their business. It does not appear that, up to the time when he wrote the last of these letters, he was aware that Almy was supplying cotton to Lippitt by reason of an assignment of the contract to him. It does appear that he knew Lippitt received cotton from Almy under the contract; but this he had done for nearly a year before Almy took the assignment of the contract, by virtue of an arrangement between Almy, Lippitt, and the assignees of Hazard and Co. as the bill itself states; and notice of the discontinuance of that arrangement is not brought home to Low, until after Almy had ceased to supply cotton to

Lippitt. The acquiescence by Low in Almy's acts of furnishing cotton, under the contract, is not therefore referable to an assignment of the contract to Almy, and still less does it amount to a ratification of such an assignment as the assignees were not able to make without a breach of trust.

If it were necessary therefore to decide the case upon this point, we must hold that Almy has failed to show a valid title from the assignees. But we are of opinion that, independent of this defect in his title, the bill cannot be maintained.

It has already been stated that Almy did not purchase this mortgage, but took an assignment of it for the purpose of obtaining payment of a debt, which Hazard and Co. owed him at the [*194] time of their failure. This is proved; and at the same *time it is shown that when he ceased to furnish cotton to Lippitt, in September, 1832, his debt was paid. Christopher H. Lippitt testifies:—

“I did converse with Samson Almy, at different times, while he was stocking the mill, in relation to the interest he had in doing so. He said the only interest he had in furnishing stock for the mill was to get a debt to him from R. G. Hazard and Co.; that he did not care to continue the business after said debt was paid, and that after that it made no difference to him who stocked the mill, whether my father or anybody else. I told Mr. Almy that if it would be any damage to him for my father to stop receiving stock from him, that he might still continue to furnish the mill. Mr. Almy replied that it would be no damage to him, and that my father had better stock the mill himself, as he, Mr. Almy, had got his debt, and more too. Subsequent to my father's furnishing the mill, Mr. Almy gave him a letter of recommendation to a house in New York, for the purpose of aiding him in purchasing cotton. He did state that he had no further interest in having the mill run for him, as he had secured his debt, as I stated in my answer to the previous cross interrogatory. He said it was a matter of indifference to him whether the mill and machinery was run any longer for him, or not, but that he would run it for my father's benefit, if so desired.” Christopher Lippitt also testifies: “At the time I stopped manufacturing for Mr. Almy, we had some conversation about furnishing cotton. Mr. Almy says, that, if I were in your place, I wouldn't manufacture for them any longer; they are all bankrupt; you don't know who you are manufacturing for. I observed to Mr. Almy that, if I stopped receiving cotton from you, won't it be an injury to you? He said, no, not in the least, for I think I've got my pay, and more too. I then observed to him, that probably I might stand in need of some assistance from

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him, if I commenced on my own account; he promised to render me all the assistance that he well could, give me some recommendations and introductions, where I might buy cotton. Afterwards, some time in the year 1834, he gave me introductions to go to New York to buy cotton. I stopped by the advice and consent of Mr. Almy. The letter he gave was addressed to Messrs. Jenkins, Merrick, and Co., New York; I was also advised by Mr. Almy to send my goods to them for sale, and I did send most of my goods to them in future, accordingly. I never heard him say that he had any lien or claim on the machinery whatever. He said the contract between me and R. G. Hazard and Co. was placed in his hands by them for the purpose of getting a debt that R. G. Hazard and Co. owed him, or that he had become obliged or bound to pay for them."

* There is nothing to control this evidence except the [* 195] testimony of R. G. Hazard. He says: "S. Almy, the only probable purchaser, to whom it seemed safe to sell, objected on account of apprehension of difficulty with Low and Fenner; but by promising my personal services in the subsequent management of the business, and obligating myself by some other conditions, I prevailed upon him to make the purchase."

This is far too vague an account of the consideration and terms of the sale to be relied on to control the explicit declarations of Almy, and the inferences to which his conduct gives rise.

This conduct tends to show he had only a conditional interest in the property, and that his interest had terminated. He not only ceased to supply cotton in 1832, declaring, at the same time, that his debt was paid, and he had no longer any interest in the matter, but he suffered Lippitt to run the machinery, and treat it as his own, until his failure in December, 1835, when Lippitt conveyed it to Wilbur and others. It rested in their hands until November, 1836, when Almy demanded it of Wilbur. Nothing more appears to have been done or said by him in reference to the property, till October, 1840, when he wrote the following letter:—

" Providence, 10th month, 1840.

" PELEG WILBUR,

" Respected Friend: I have consulted counsel respecting the claim I have against thee, and have made up my mind to commence a suit immediately, unless there is a settlement. If thee would like to see Mr. Hazard, he will be in town on the 26th instant.

" Thy friend,

" SAMSON ALMY."

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Two years more elapsed, making ten years, from the time when he ceased to have any thing to do with the machinery. This bill was then filed, and R. G. Hazard is very active in the management of the suit, as he says, by reason of an understanding between Almy and himself, when the assignment was made. This understanding must have been included by him in that part of his testimony, where he speaks of promising his "personal services in the subsequent management of the business, and obligating himself by other conditions;" and, if one of those conditions was that Almy took the transfer, by way of security, and his debt had been paid, it is quite consistent with Almy's real relation to this property that he should lie by ten years, and when he moved that R. G. Hazard should be active also.

[* 196] * But we find another piece of evidence in the record, to which it is proper to advert. It is the examination of Almy before the master upon the subject of his title, in which he has undertaken to give what he calls "the history of the whole matter." It is as follows:—

"In reply, I must give you the history of the whole matter. In 1829, I think, I made arrangement with Rowland G. Hazard, Low and Fenner, and Christopher Lippitt, to furnish stock to Christopher Lippitt under the contract made by R. G. Hazard and Co., and Christopher Lippitt, they agreeing to give me one half of the profits for doing the business. We went on in that way, until I made the purchase of the machinery, after which I became sole owner and went on under the contract. At the time of R. G. Hazard and Co.'s failure, they owed me five or six thousand dollars, due by note, and the consideration of the contract or bill of sale was those notes, so far as they were required; that is, the agreement was, that that bill of sale, so far as it went, should go to cancel these notes. The notes thus cancelled, it is my impression, were surrendered to R. G. Hazard, as agent for the assignees. I can't say that Mr. Hazard acted as agent of the assignees when I surrendered the notes to him: he did when the contract was made. I can't remember when I surrendered the notes to Mr. H., nor how many of them there were. I could ascertain, if time were allowed."

This is perfectly explicit, except on one point, and that is, whether the transfer to him was an absolute sale extinguishing the notes, or by way of collateral security for the notes. A close examination of his statement will tend to show it to have been the latter.

He says: "The consideration of the contract, or bill of sale, was those notes, so far as they were required; that is, the agreement was, that that bill of sale, so far as it went, should go to cancel those notes."

But, if the consideration of the sale was the extinguishment of the notes, what is meant by its extinguishing them, so far as it went? This language is intelligible, if the agreement was that he should work out his debt through this contract with Lippitt. In such case, the bill of sale might be said to extinguish the notes so far as it went; that is, so far as it should prove to be effectual for that purpose. And this construction is much strengthened by the fact that he does not profess to have surrendered any of the notes at or about the time when the transfer was made to him, and there is no reason to believe he did so before his debt was paid. Taking this statement of Almy, in connection with his repeated declarations to the Lippitts, and his conduct in reference to this property, we cannot doubt that the * transfer was made solely to enable him to obtain payment of these notes by means of the contract with Lippitt, and that payment was thus obtained.

Other questions have been made in the case, which we have not found it necessary to decide. Our opinion is that the decree of the circuit court should be reversed and the bill dismissed with costs.

ANDREW ERWIN, Appellant, v. WILLIAM S. PARHAM, JAMES DICK,
and HENRY R. W. HILL.

12 H. 197.

A bill in equity, which states as the complainant's title, that he purchased, under regular proceedings, and at an open and fair execution sale, a debt of \$260,000, for \$600, is not bad on demurrer.

THE case is stated in the opinion of the court.

Johnson for the plaintiff.

No counsel *contra*.

* CARRON, J., delivered the opinion of the court. [* 200]

This case comes up from the equity side of the circuit court for the fifth circuit and district of Louisiana, by appeal from a decree supporting a demurrer to a bill of complaint filed by the present appellant.

The bill, filed 24th February, 1847, states, in substance, that * in the year 1842, one William M. Beal, a resident of [* 201] the city of New Orleans, obtained judgment in the United States circuit court for the southern district of Mississippi, against James M. Wall, for the sum of \$2,265.13, besides costs. That upon this judgment, execution was issued in the last-mentioned district,

where Wall then resided, and that such execution was returned *nulla bona*. That subsequently, and in the year 1845, this judgment being in full force and unpaid, Beal filed his petition in the ninth district court of the State of Louisiana, held in and for the parish of Madison, setting forth the judgment, and praying that, by the law of Louisiana, it might be made executory in that State, and that process thereon might be granted him against all the property, real and personal, rights and credits of Wall, in the State of Louisiana, and that they might be applied to the satisfaction of his rightful claim. That executory process was granted by the court so petitioned, and that, in pursuance of an order of seizure and sale thereupon made, a writ of *fi. fa.* was, on or about the 19th March, 1846, issued to the sheriff of the parish of Madison, commanding him to seize all the property, rights and credits of Wall, within his parish, and to sell them for the liquidation of the aforesaid judgment. That in accordance herewith, the sheriff did, on the 24th January, 1846, seize all the right, title and interest of Wall, in and to thirteen certain promissory notes, each and all of them bearing date on the 16th January, 1839, each for the sum of \$20,369.23, payable respectively on the 1st of January, 1842, and upon each succeeding 1st of January until and including the 1st of January, 1854. Each and all of these notes being signed and executed by William S. Parham to and in favor of James M. Wall, and paraphed "*ne varietur*" by A. J. Lowry, Esq., notary public in and for the parish of Madison, in order to identify the said notes with an act of mortgage and sale, passed before said Lowry on 16th November, 1839, between William S. Parham, as vendee, and James M. Wall, as vendor, by which deed the payment of these thirteen notes bore a mortgage and privilege upon certain property, movable and immovable, in said deed described, together with all and singular the mortgage, liens and privileges by said deed created, or which, by operation and effect of law, subsisted to and in favor of James M. Wall.

That the sheriff did advertise the property so seized for the satisfaction of the judgment in favor of Beal; and on the first Saturday of May, 1846, having complied with all the requisites of the law, exposed for sale, at public auction, two of the promissory notes, namely, those falling due the 1st of January, in the years 1846 and 1847; and that these two notes were, for the sum of \$300, [* 202] purchased by this appellant and one John W. Nixon * conjointly, together with all the right, mortgages, equities and privileges appertaining thereto, that being the last and highest bid. Whereupon said two notes, together with all the mortgages, &c., pertaining to them, were conveyed by the sheriff to the appellant and said John W. Nixon.

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'That at the same time, the eleven other of the said notes were, for the further sum of \$300, sold and conveyed by the sheriff to the appellant, together with all and singular the equities, &c., attaching to them. The following is the sheriff's return on the execution, exhibited as part of the bill:—

“Received on the 19th day of January, 1846, and executed on the 24th day of January of the same year, by attaching, in the hands of William S. Parham, all the notes described in the notice of seizure, and by seizing the same as described in the said notice of seizure, by virtue of the within writ; and after having advertised the same for the space of fifteen clear days, the sale to take place on the first Saturday of March, 1846, and on which first Saturday of March, 1846, I proceeded to offer the same for sale for cash, after causing the same to be appraised, and no person present bid for said property two thirds of the appraisement of the same, no sale was effected. Wherefore I, the sheriff, readvertised the same upon a credit of twelve months, for the space of thirty clear days, the sale to take place on the first Saturday of May, 1846, on which said first Saturday of May, 1846, I, the said sheriff, proceeded to offer the said property for sale upon a credit of twelve months, at the court-house door in Richmond, La., and J. J. Amonette being present and acting as agent for Andrew Erwin, and Robert Garland being present and acting as agent for John M. Nixon, bid for the notes described in said notice of seizure, due 1st January, 1846, and 1st January, 1847, the sum of \$300, which being the last bid or offer made, the same was struck off and adjudicated to the said Erwin and Nixon, at and for the said sum of \$300, and at the same above-described day I, the said sheriff, proceeded to offer the eleven other notes, as described in the notice of seizure annexed hereto and made a part of this return, on the terms and conditions above described, and no person being present, bid therefor two thirds of the appraised value of the said property, no sale was effected. Whereupon I, the said sheriff, readvertised the same, the sale to take place at the town of Richmond aforesaid, on the first Saturday of May, 1846, upon a credit of twelve months, for the space of thirty clear days; I, the said sheriff, proceeded to offer, on the said first Saturday of May, 1846, at the town of Richmond aforesaid, the said property; and James J. Amonette being present, and acting as agent for Andrew Erwin, bid therefor the * sum of \$300, which being the last and highest [* 203] bid or offer made, I, the said sheriff, struck off and adjudicated the said property to the said Andrew Erwin, at and for the said sum of \$300; and the said Amonette, acting as counsel for the

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plaintiff herein, has authorized me, the sheriff, to credit this writ the amount of each of said bids, \$600.

“Richmond, La., May 13, 1846.”

That at the time of the seizure of all these several promissory notes, they were in the possession or control of James M. Wall, and he was at that time invested with all the liens, equities, &c., pertaining to them.

That of all the proceedings of the sheriff of Madison, by virtue of this execution, and of the sale of the several notes to the appellant and Nixon, both Wall and Parham, and all claiming under them, had due legal and constructive notice.

That Nixon had, a few weeks before the filing of the bill, parted with all his interest in the two notes which he had purchased conjointly with the appellant, to some person unknown to the appellant.

The bill then states, that on or about the 16th of November, 1839, James M. Wall was seized and possessed of two large and valuable plantations, of a great number of negroes, and of a large stock and all the utensils, &c., pertaining to so extensive an estate; and being so seized and possessed, he on the day and year last mentioned, conveyed the same to William S. Parham, in consideration of the sum of \$299,999.99, of which a portion was paid in cash, and the rest was represented by the thirteen several promissory notes above referred to.

That notwithstanding James M. Wall and all claiming under him had legal and constructive notice of the sheriff's seizure on the 24th of January, 1846, of these various promissory notes, yet the said Wall did, on the 31st of January of the same year, execute his promissory note to James Dick and Henry R. W. Hill for \$1,846.46, payable on the 1st of April, 1846, and as security therefor, pledged those two of the notes of Parham in favor of Wall, falling due the 1st January, 1845, and 1st January, 1846.

The bill further states, that within a few weeks before the date thereof, the said Dick and Hill had become possessed of the eleven other notes, but by what means the appellant knows not. That said Dick and Hill had recently discharged William S. Parham from all liability to Wall, or any person or persons claiming under said Wall. That the notes of Parham, in favor of Wall, and above referred to, cannot be met by the drawer unless the property purchased by him of Wall, and charged with the payment thereof, be subjected to their liquidation.

[* 204] * That the said Dick and Hill, being possessed of the said thirteen promissory notes, and professing to act in virtue of

the mortgages, equities, and liens pertaining to such notes, had on the 2d of January, 1847, levied upon, seized, and at public auction sold to themselves, as highest bidders, the property charged with the payment of these notes, for the sum of \$50,000; but the complainant cannot state by virtue of and for what particular note or notes.

That the sum of \$50,000, the alleged consideration money for this sale, was less than one third of the real value of the property sold.

The bill alleges that the proceedings between Dick and Hill and Wall, and between Dick and Hill and Parham, were the result of combination and conspiracy to defraud the complainant. That on the 1st of August, 1842, William S. Parham, by deed, conveyed to Mrs. Elizabeth Jane Parham, (the mother of the said Parham and of James M. Wall,) all and singular the property, real and personal, which, in the year 1839, had been conveyed by said Wall to said Parham, for and upon consideration, amongst others, that the said Elizabeth Jane Parham would discharge the thirteen promissory notes charged upon the property; but that the said Elizabeth Jane Parham was at the time of this conveyance aged and infirm, and without any other means of paying for the property than by the profits of the property itself; charges said conveyance to be fraudulent and void as to the creditors of Wall or Parham; that it could interpose no hinderance to complainant's recovery. That Elizabeth Jane Parham died in the year 1844, leaving William S. Parham and James M. Wall her heirs at law.

The bill alleges that the property in question, and upon which the notes are a lien, is not adequate security for their payment, unless all the revenues, issues, and profits of the estate be appropriated to their liquidation. That since the sale of the estate to Parham, such property has greatly depreciated, and that it would not, at the time of bill filed, bring at public sale any thing like its real and just value. That the revenues and profits of the estate are from \$20,000 to \$30,000 per year. That ever since the conveyance to Mrs. Elizabeth Jane Parham, James M. Wall and William S. Parham have resided upon the estate; the first having the sole management and control of the property, its issues and profits, and both deriving their maintenance and support therefrom.

The bill claims, that if the sale by Dick and Hill was lawful and in good faith, that the proceeds of that sale should be distributed *pro rata* among the several thirteen promissory notes; and after propounding interrogatories, prays the court to award to the
* complainant the possession of the thirteen promissory [* 205]
notes, and that he be decreed to have all the liens and priv-

ileges pertaining to said notes : That the conveyance to Mrs. Elizabeth Jane Parham be set aside. That the sale of the 2d January, 1847, under which Dick and Hill claim, be declared null ; that a receiver be appointed, and that the defendants be restrained by injunction from intermeddling with, or disposing of the property in question, or using or disposing of any of the said thirteen promissory notes.

On the 5th of March, 1847, a writ of injunction was granted, and afterwards answers were put in by the defendants, but were subsequently withdrawn, by agreement of counsel, and a demurrer filed, alleging that the bill made out no title to the discovery sought in the interrogatories, and did not contain sufficient matter of equity to establish the claim for relief.

The hearing coming on upon bill and demurrer, on the 8th of February, 1848, the demurrer was sustained, the injunction dissolved, and the bill dismissed with costs, and from this decree the complainant below prosecuted an appeal to this court.

The appellant contends :—

1. That the notes from one to thirteen inclusive, by virtue of the executory process of seizure, sale, and purchase, averred in the bill, became the property of the complainant in his own right as to eleven of them, and to one half of the other two, the other half having been originally in J. W. Nixon.

2. That as such owner of said notes, he had a specific lien upon the property, real and personal, mentioned in the bill.

3. That upon that ground alone, as well as upon the ground of discovery, he had a right to the relief prayed.

4. That he was entitled to relief also upon the ground of the corrupt combination and conspiracy between the defendants, Dick and Hill and James M. Wall, to defraud the complainant, as well as upon the ground of like combination and conspiracy between Dick and Hill and William S. Parham to defraud the creditors of said Wall.

5. That if the property subject to the incumbrance of said notes is not in the hands of Dick and Hill responsible for the whole amount of the notes, it is at least responsible in the proportion that said amount bears to the sum of \$35,979.79, with the interest thereon, being the amount of the note made by Wall to Dick and Hill, dated 31st January, 1846.

No counsel appeared for the appellees, Dick, Hill, and Parham ; and as it does not appear by the demurrer on what grounds of defence the respondents relied in the circuit court, or wherefore the court dismissed the bill, we have examined for ourselves, so far as

we were enabled, whether any legal defect exists in the * proceeding and process under which the notes were seized [* 206] and sold. The bill alleges that all the steps taken were in due form of law; nor is any thing found in its statements contrary to the laws of Louisiana, so far as we can ascertain, that will render the sale void.

And as the bill stands on demurrer, and nothing beyond its allegations can be considered, it is not possible for us to say that the complainant is entitled to no relief at all, and therefore dismiss his bill. He paid only six hundred dollars for these thirteen notes, calling, in the aggregate, for \$260,000; but this was paid on an execution sale, admitted by the demurrer to have been open to competition, regular and fair. The payer, Parham, may have been insolvent, and the mortgage of no value for want of title in the mortgagor. In such event, no startling inadequacy of price could be predicated of the enormous disparity between the nominal amount of the notes, and the price paid for them. Complainant is entitled to relief as the case now stands, certainly to the extent of the six hundred dollars, and interest on it; and he having a right of possession, and owning the judgment, it is not perceived how he could be deprived of the notes until his whole judgment was satisfied. Or, his rights may extend to an enforcement of the mortgage and all the notes. We deem it useless further to speculate on these matters at present.

On the other hand, the execution sale may be void for reasons that can be brought out in evidence, but which are not now open to controversy, because the bill alleges that the proceeding under which complainant purchased was regular and *bonâ fide*. Or again, because of want of title in Wall to the notes and mortgaged property at the date of the levy and sale. These matters, or any others set up in defence, respondents may bring forth by their answer if they think proper to do so.

All we mean now to say is, that complainant has made a *prima facie* case for answer and for relief; and it is the duty of respondents, if they mean to defend, to meet that case by answer, and to show, if they can, that no relief should be granted; or, if any, to what modified extent compared with the entire relief prayed. We therefore feel ourselves bound to reverse the decree, and to overrule the demurrer, with leave to respondents to answer in the circuit court, when this cause is returned there on our mandate.

NELSON, J., dissented.

I am unable to assent to the decision of a majority of the court in this case.

The complainant has purchased, at sheriff's sale, thirteen promissory notes, given as part of the purchase-money upon a [* 207] * sale of a large plantation and slaves ; and secured by mortgage on the same to an amount exceeding \$260,000 for the small sum of \$600 ; and asks the interposition of the extraordinary powers of this court on the equity side to aid him in realizing this enormous speculation.

I think he should be left to his remedy at law, and this, upon the established course of proceeding of a court of chancery in these cases.

In *Seymour v. Delancy* and others, 6 Johns. Ch. R. 222, Chancellor Kent held that a specific performance of a contract of sale is not a matter of course ; but rests entirely on the discretion of the court, upon a view of all the circumstances. And that though mere inadequacy of price, independent of other circumstances, is not, of itself, sufficient to set aside the transaction ; yet it may be sufficient to induce the court to stay the exercise of its discretionary power to enforce a specific performance. * All the cases on this subject will be found reviewed in that case ; and, also, by Chief Justice Savage in the court for the correction of errors, where the decree in that case was affirmed. 6 Cow. 445.

The chancellor, after having referred to many of the cases particularly, observed that these cases show the antiquity of the doctrine of the court ; and that the power of awarding the specific execution of contracts, for the sale of land, rested in sound judicial discretion, and was not to be applied to cases that were hard, or unfair, or unreasonable, or founded on very inadequate considerations.

The strong ground against enforcing a contract, where the consideration is so inadequate as to render it a hard bargain, and an unequal and unreasonable bargain, is that, if a court of equity acts at all, it must act *ex vigore*, and carry the contract into execution with unmitigated severity ; whereas, if the party be sent to law, to submit his case to a jury, relief can be afforded in damages with a moderation agreeable to equity and good conscience, and when the claims and pretensions of each party can be duly attended to, and be permitted to govern the assessment.

In the case before us, if the court undertakes to give relief, it would seem, from the established rules of proceeding in equity, that it will be bound to award to the complainant the full amount of the notes in question ; and thus enable him to realize upwards of \$260,000 upon a purchase at the price of \$600 ; in other words, virtually awarding to him, for this small consideration, an estate, which Wall, one of the defendants, had sold for a sum exceeding \$260,000,

as the notes in question constitute part of the purchase-money and the payment secured upon this estate.

* The inadequacy of the consideration is far beyond that [*208] of any case that has come under my observation in the course of this examination, and is such as to shock the common sense of mankind.

In many of the cases in which the court has refused to interfere, mainly on the ground of inadequacy of price, only half the value had been agreed to be given. That was considered as sufficient evidence of a hard and unconscionable bargain, to induce the court to pause, when its extraordinary powers were invoked to the aid of the party seeking to realize the advantage of the contract, and turn him over to a court of law.

The complainant in this case is not without a remedy. If he has got a legal right, he can go into a court of law and enforce it. But I do not think it a fit case for the interposition of a court of equity.

I do not regard the allegation of a fraudulent attempt on the part of the defendants, to prevent the complainant from realizing the benefit of his purchase; as the question, whether or not a court of equity should interfere and grant the relief prayed for, in my judgment, is wholly unaffected by any such considerations; for, assuming the fraud should be hereafter established, and this impediment to the enforcement of the claim set up under the purchase, removed, even then, according to the course of proceeding in a court of equity, as already stated, that court would withhold its extraordinary power from aiding the party to obtain so unjust and unconscionable advantage, and turn him over to a court of law. By entertaining the case, as presented in the bill, and directing an answer, the court assumes that, if the complainant can establish the fraud in the transfer of the notes as charged, he is entitled to its decree for the whole amount of his purchase; for, as we have seen, a court of equity must act, if at all, *ex vigore*, and carry into execution the purchase as it has been made. It cannot consistently, in the exercise of its power on this subject, carry the purchase into partial execution by separating it, granting the execution in part, and withholding it in part. This would be arbitrary, and unsupported by any rule or principle to guide the judgment of the court.

Whether the court will entertain the case at all, or not, and give the relief prayed for in these cases, is a question of judicial discretion; but, when once entertained, and held to be a proper case for the relief, there can be no other given, consistent with established principles, than such as the legal title or right set up carries along with it. If it gives to him an estate in land, the court cannot stop at a moiety

of it; nor, in this case, in awarding any amount less than the \$260,000. The legal title to the whole amount is as complete as to any portion of it.

[* 209] * For these reasons, thus briefly given, I am obliged to dissent from the decision in this case.

THE UNITED STATES, Appellants, v. MICHAEL MOORE.

12 H. 209.

Some account of the officers by whom the power to grant lands in Louisiana was exercised, under the Spanish authorities.

A claim under an alleged purchase from the Spanish authorities, held, upon the evidence, and the presumptions arising from the lapse of time and the surrounding circumstances, to have been extinguished, by the Spanish authorities before the cession of Louisiana to the United States.

The district court, proceeding under the act of May 26, 1824, (4 Stats. at Large, 52,) cannot make an indefinite decree, in favor of the petitioner, for such quantity of land as the United States may have sold of the land adjudged to belong to him; the precise quantity must be ascertained by the decree; and it is to this end, in part, that the act requires those in possession of any part of the land claimed by the petitioner, to be made parties.

Though the amendatory and repealing clauses of the acts of May 23, 1828, (4 Stats. at Large, 284.) and May 24, 1828, (4 Stats. at Large, 298,) do not require adverse claimants to be made parties to a petition, yet the act of June 17, 1844, (5 Stats. at Large, 676,) which revived and extended the act of 1824, does not incorporate those provisions in either of these acts of 1828, and, proceeding under this act of 1844, adverse claimants must be made parties.

APPEAL from the district court of the United States for the eastern district of Louisiana. The material facts appear in the opinion of the court.

Crittenden, (attorney-general,) for the appellants.

No counsel *contra*.

[* 217] * CATRON, J., delivered the opinion of the court.

The petition states, that about the 11th September, 1797, Antonio Yriarte, a resident of the province of Louisiana, for the sum of 24,708 reals by him paid, purchased from the proper authorities under the government of Spain, to wit: Juan Ventura Morales, the intendant of the province of Louisiana, and Gilbert Leonard, the treasurer of said province, sixty thousand arpens of land, &c., all of which more fully appears from the annexed certificate, signed by the said Morales, Leonard and Carsetano Valdes, secretary of the intendant, acknowledging the receipt of the consideration and the sale of the land above expressed.

The first question arising on this statement of facts is, whether the

paper exhibited affords any evidence that the "proper authorities" of Spain sold the land to Yriarte, as this party can only sue for lands claimed by virtue of any French or Spanish grant, concession, warrant, or order of survey, "legally made."

His petition alleges that the land was purchased on the 11th September, 1797, from Morales, the intendant, and Leonard, the treasurer of the province. The act positively requires that the date of the sale, concession, &c., shall be set forth, and by whom it was made, in order that it may be seen whether the officer, making the concession, or sale, had power to do so, at the time it was done; and here, the question of power existing in the intendant is raised by an allegation of the fact, and a denial in the answer. Undoubtedly, Leonard had no authority to sell, or distribute by donation, any part of the public domain; but this would be of no consequence if Morales had such power. When the paper exhibited bears date, a controversy existed between the intendant, Morales, and the political and military governor of Louisiana, as to which of them appertained the power to sell and distribute the king's domain, the intendant claiming authority under the laws of the Indies, and the governor relying on a royal order of August, 1770. The following historical account will best explain how the matter stood in 1797, when (as is alleged) this sale was made.

O'Reilly, by commission dated 16th April, 1769, was appointed governor and captain-general of Louisiana, with "special power to establish in this new part of the king's dominions, with regard to the military force, police, administration of justice and finances, such a form of government as might most effectually secure its dependence and subordination, and promote the king's service and the happiness of his subjects." 2 Mart. 2.

* Unzaga, colonel of the regiment of Havana, who had [* 218] come with O'Reilly, had a commission as governor; but was not authorized to enter upon his duties until the departure of O'Reilly, or the declaration of his will. On the 1st December, 1769, O'Reilly made the declaration, and Unzaga assumed the functions of governor. 2 Mart. 13.

On the 18th February, 1770, O'Reilly made the regulations relating to the granting of land, known by his name. The 12th article declares that all grants shall be made in the name of the king by the governor-general of the province. 2 White's Recop. 230.

A royal order of the 24th August, 1770, states, that O'Reilly had communicated the regulations made by him to his government, and these declaring that the granting of land had been confided by his majesty to the governor and *comisario ordenador*, he considered it

would be better in future, that the governor alone should be authorized by his majesty to make those grants. The order to the governor then proceeds: "The king having examined these dispositions and propositions of the said lieutenant-general, approves them, and also, that it should be you and your successors in that government only, who are to have the right to distribute the royal lands, conforming in all points, as long as his majesty does not otherwise dispose, to the said instructions, the date of which is 18th February of this present year." 2 White's Recop. 460.

The governors who succeeded Unzaga were, Galvez, colonel of the regiment of Louisiana, to whom Unzaga, when he was appointed captain-general of the Caraccas, was directed to surrender the government provisionally, by a *cedula* of 10th July, 1776. Galvez entered on the duties of his office 1st January, 1777. 2 Mart. 39.

Miro succeeded Galvez; the government of the province being provisionally vested in him on the departure of Galvez in 1782. 2 Mart. 68.

Carondelet was promoted from the government of San Salvador, and entered on his duties 1st January, 1792. 2 Mart 81.

Gayoso, the commandant at Natchez, succeeded Carondelet in the beginning of 1797. 2 Mart. 149. His regulations for the administration of posts and distribution of lands, are dated 9th September, 1797.

So far as we have seen, the exclusive authority vested in the governors to make grants, stood unrevoked up to this time. But on the departure of Rendon, who had been intendant in 1796, the functions of intendant devolved on Morales, who had been *contador*. 2 Mart.

131. Morales, thus intendant *ad interim*, in a letter to Gov-
[* 219] ernor Gayoso of the 29th August, 1797, * (a few days before the latter issued his regulations,) claimed the right to grant the lands. 2 White's Recop. 470. Gayoso declined to yield, but "resolved to submit the question to higher authority, and to allow no innovation until the resolution of his majesty be made known." 2 White, 470, 471. Morales also wrote a long letter to Spain on the subject.

A royal order of 22d October, 1798, addressed to Gayoso, states the receipt of his and Morales's communications "respecting the right of granting and distributing royal lands in the district under your command, which right has been vested in the political and military governor since the order of August 24, 1770," and proceeds thus: "The king has resolved, for the sake of the better and more exact observance of the 81st article of the royal ordinance for intendants of New Spain, that the exclusive faculty of granting and dis-

tributing lands, of every class, shall be restored to the intendency of the province, free from the interference of any other authority, in the proceedings as established by law; consequently the power, hitherto residing in the government to those effects, is abolished and suppressed, being transferred to the intendency for the future." 2 White's Recop. 478.

The royal order was communicated from Spain to Morales on the same 22d October, 1798. In the communication to Gayoso, and that to himself, Morales is styled intendant, *ad interim*.

The royal order seems to have reached Morales in February, 1799, before it did Gayoso. Some correspondence then took place between them, and Morales became vested with the power of making sales and grants. 2 White, 478-484. He issued his regulations 17th July, 1799. Ibid. 234.

It will thus be seen, that the authorities in Spain considered the royal order of 24th August, 1770, as of force up to February, 1799. The language is too plain to admit of a doubt. The preamble of Morales's own regulations states, that the power to grant was vested in the military and political government, from 24th August, 1770, to 22d October, 1798.

To the same effect is the report of Pintado, dated at Havana in 1822, respecting lands in Florida, communicated to our government. 2 White's Recop. 339. See, also, 2 Mart. 158.

At the date of the receipt to Yriarte, 11th September, 1797, the question between Gayoso and Morales had not been settled by the king. In fact, it was only a few days after he had addressed the first letter to Gayoso on the subject.

In the correspondence of Morales with Gayoso and the authorities in Spain, he refers to the eighty-first article of instructions to intendants, as giving some foundation for his claim. The instructions were dated in December, 1787. 1 White's * Re- [* 220] cop. 360. They will be found more at length in 2 White, 67, and it will be seen to apply only to twelve intendancies thereby created and expressly named in New Spain; it did not apply to Louisiana. This article seems not to have been sent to Louisiana, or been known there until Morales brought the question up in 1797. The royal order of 1798, transferring the power to distribute the land for the future, is conclusive that the eighty-first article had no application to Louisiana.

Some of the governors acted also as intendants; but that would not alter the power conferred. It was in their capacities as governors they were authorized to make grants, and not as superintendents of the finances.

The first intendant seems to have come to the country with O'Reilly. His name was Francisco de Loyola. 2 Mart. 2. He died in 1670, and was succeeded by Gayarre, as intendant, *ad interim*. 2 Mart. 21.

Unzaga had the office of intendant united to that of governor. 2 Mart. 34. Galvez, when appointed governor, was also appointed intendant. 2 Mart. 39. During the time he was engaged in the expeditions against the British possessions in West Florida, he had no time to bestow on fiscal affairs, and Martin Navarro was appointed intendant in the beginning of 1781. 2 Mart. 54. He left the province for Spain in 1788, and the two offices were again united in the person of Miro. 2 Mart. 180. Carondolet was intendant as well as governor. 2 Mart. 111. On his representation, the office of intendant was separated from that of governor, and Francisco de Rendon, who had been the secretary of the Spanish legation in the United States, was appointed, and arrived at New Orleans in the beginning of 1794. 2 Mart. 122. Rendon was afterwards sent to Zacatecas, and Morales was appointed, *ad interim*, 1796. 2 Mart. 131.

Thus it appears that Morales, in his letter of August 29, 1797, to Governor Gayosa de Lemos, claimed the right to sell, distribute, and grant the public lands; and insisted that the governor should not oppose the intendency in the free and open jurisdiction appertaining to it, and with which no one had a right to intermeddle. And, on the next day, (30th August, 1797,) the governor replied that, as discussion of the question would embarrass the king's service, and as the intendant claimed cognizance of causes respecting sales, agreements, and distributions of royal lands, he resolved to submit the question to higher authority, "and to allow no innovation until the resolution of his majesty be made known."

The governor, having partly shrunk from the contest, it is highly probable that the intendant did assume to make the sale set forth by the receipt, which bears date twelve days after the governor's letter. As no authority existed in the intendant to deal with the king's domain from 1769, when Spain first got possession of Louisiana, up to the date of the king's order made in October, 1798, it is manifest that Morales had no power to sell in September, 1797; and there is no evidence that the king sanctioned this sale, nor can it be inferred from any thing appearing in the case. We think the contrary is apparent.

In 1797, Yriarte resided at New Orleans, and continued in this country for ten years or more, as Blache states, and then removed to old Spain. He resided at Madrid, when he transferred the receipt to

Moreno in 1835. Yriarte never took possession of the land claimed, nor did he take any further step to secure the property.

By the regulations of O'Reilly, made in 1770, and sanctioned by the king, Yriarte was compelled, if he was owner, to make mounds or levees in front of his land on the banks of the Mississippi, and also to clear and ditch the whole front of the depth of two arpens within three years from the date of his purchase; and, in default of fulfilling these conditions, the land was to revert to the king's domain and be granted anew. Neither could he sell until after three years' possession, and until the above-mentioned conditions were entirely fulfilled; and, says the third regulation: "To guard against every evasion in this respect, the sales of said lands cannot be made without a written permission from the governor-general, who will not grant it, until, on strict inquiry, it shall be found that the conditions above explained have been duly executed." That is to say, no sale could be made, or formal title issued, until these conditions were complied with.

The land claimed fronted on the Mississippi River for twenty miles and more, and on the great western outlet, the Atchafalaya, to an equal extent; and, if no mounds were made, the country below must have been overflowed every year to a ruinous extent. Levees were indispensable; their construction was a high public policy, and forfeiture an inevitable necessity, in case of failure. These were laws and ordinances of the government under which the claim originated, and which the act of 1824 instructs us to observe; the Spanish government was not bound to complete the title; but, on the contrary, under a necessity to declare it forfeited. This is plainly manifest. Even admitting that Morales, as intendant, had full power to make the sale, still, forfeiture was inevitable. Under these circumstances, it is idle to assume that Morales's act of sale received any sanction from the king of Spain, or from any one exercising his authority.

Embarrassed as Yriarte was with the want of power in Morales to sell, and the stringency of O'Reilly's regulations compelling * him to occupy, clear, ditch, and levy, a necessity [* 222] was imposed on him to surrender his purchase and have his money refunded; and there are several reasons apparent why we think he did so. In the first place, he labored under no disability or impediment; he remained quiet, never took possession, nor asked for a survey up to the change of flags in 1804; nor did he ask for a confirmation of Morales's void act from the Spanish authorities. And, after the United States assumed jurisdiction, boards of commissioners almost constantly existed before which his claim could have been presented, and through them, reported to congress for

political action thereon; yet no step was taken, and the claim slept in the hands of Yriarte until 1835, when he sold it in Madrid; and it first made its appearance in this country, when presented to the district court, in June, 1846. When there adduced in evidence, the receipt was cut in gashes and stained, having the appearance of a neglected, valueless, and cancelled paper. To account for its appearance, one Campo deposed for plaintiff, that, in his opinion, the cut and dilapidated condition of the document grew out of this fact: "That the officers of quarantine in Spain, in order to prevent the spreading of infectious diseases, immersed documents in vinegar, and cut them in this manner. This was in order to make the vinegar penetrate more easily, and this he thinks has been the case with the document in question, and, therefore, its discolored and cut appearance." He further states, "that all the documents from Spain are cut in like manner; that he has often seen them; he has in his possession letters cut in the same way."

This was obviously a private receipt held by Yriarte, and carried by him to Spain; and as the money he had paid in Louisiana went to the royal treasury, and was transmitted to Madrid as the receipt shows, the fair presumption is, that when the receipt was there presented, and the money refunded, the marks of cancellation were made by cutting the paper in gashes, as no reason can be perceived why the holder would thus deface his own document; nor can it be imagined why a mere sheet of paper should be thus cut to let in an acid, if such practice prevailed, which we suppose, however, to have no foundation in fact, as witnesses in abundance could have been produced to support this improbable account, if it were true that all documents, coming from Spain, are cut in like manner and stained with vinegar.

We are called on to decide in this case according to the rules governing a court of equity, and are bound to give due weight to lapse of time.

The party was under no disability, and slept on his rights, as he now claims them, for nearly fifty years, without taking a [* 223] * single step. He makes no excuse for his long delay, and cannot now get relief by having his title completed.

No case has come within our experience, where the obscurity and antiquity of the transaction more forcibly than in the present case, required a court of equity to bar a complainant on legal presumptions founded on lapse of time; and where the bar should take the place of individual belief.

The government had taken possession, and had sold out these lands to a great extent, and was bound in good faith to protect its

vendees; that these private owners could have relied on the lapse of time, and defeated the claim set up, is clear; and on principle, their vendor could do so likewise.

Even had this claim been adjudged valid by this court, still, the decree below is in part erroneous. The part referred to is as follows: "It is further ordered, adjudged, and decreed that, in case said lands so claimed by said petitioner, or any part or portion thereof, shall have been sold by the United States, or otherwise disposed of, said petitioner, Michael Moore, shall be and is hereby authorized to enter in any land-office in the State of Louisiana, in parcels conformable to sectional divisions and subdivisions, a like quantity of public lands, after the same shall have been offered at public sale."

By the act of 1824, it is provided that, if it shall so happen that the lands decreed to any complainant "shall have been sold by the United States, or otherwise disposed of, it shall be lawful for the party interested to enter the like quantity on other lands." Here, the decree is general against the United States, and awards to complainant floating warrants for all lands that the United States may have sold, or otherwise disposed of, within the bounds of the tract decreed. The act requires the names of all persons claiming the land sued for, or any part of it, to be set forth in the petition, and that they shall be made defendants in due form by citation; and if the entire tract is claimed by private persons, then they shall be sole defendants; but if the government is owner in part, or of the whole, then this fact shall be stated, and the attorney of the district must be served with process, and be allowed to answer for the United States. The purpose of congress was, first, to authorize a suit against the United States; and, in the next place, to give judicial cognizance of a description of incipient claims having no standing in a court of justice before the act was passed; and, thirdly, that the petitioner should be bound to sue private persons, claiming the same land, so that those having an interest, and better knowledge of facts, and more capacity to defend, than the United States, might be drawn into the contest; and that they should be compelled to produce their title, so that, if a decree was made for complain- [* 224] ant, the court could ascertain what part of the land should be granted to him by patent; and, as this could only be done by a specific ascertainment of interfering claims, the decree must of necessity specify their boundaries and quantities. Nor can it stop here; it must adjudge that a warrant shall issue, and be subject to location. This decree is not only in general terms, but it is contingent, that, in case all the lands claimed, or any part or portion of them, have been

sold or otherwise disposed of by the United States, then the petitioner shall be authorized to enter a like quantity, &c.

The district court, as we apprehend, did not proceed to adjudge other lands as an equivalent, on the act of 1824, as it originally stood, but on amendatory and repealing clauses found in the 8th section of the act of May 23, 1828, extending the law to Florida; and especially to the 2d section of the act of 24th May, 1828, giving further time to claimants in Missouri and Arkansas to institute suits; both of which clauses declare that so much of the act of 1824 as requires petitioners to make adverse claimants parties to the suit shall be and are thereby repealed. The act of 24th May, 1828, contains various other provisions; some of which modify, and others repeal, parts of the act of 1824.

The act of June 17, 1844, provides that so much of the act of May 26, 1824, as relates to the State of Missouri, is thereby revived and reenacted; and the same jurisdiction is given to the district courts of Arkansas, Louisiana, Alabama, and Mississippi, as was exercised under said act in Missouri; with the exception of that part of the act (being sections 14 and 15) that applied exclusively to the territory of Arkansas, which only allowed claims of a league square, and under, to be adjudicated. The thirteen previous sections stand incorporated in like manner as they would be if they had been copied into the act of 1844. No language to this effect could make it plainer; any attempt to incorporate likewise the act of 24th May, 1828, into that of 1844, would not only be a forced construction, but a manifest perversion. It follows that the law, as found in the first thirteen sections of the act of 1824, furnishes all authority the district court had, to proceed, and to decree an equivalent; and that the true mode of proceeding, according to the law as it stands, is as above stated, we suppose to be not open to controversy.

This view of the act of 1844 was very forcibly presented to us by the attorney-general, in the case of *The United States v. Boisdoré's Heirs*, coming up from Mississippi, 11 How. 77; but, as we then apprehended that no similar irregularity might again occur, no notice was taken of it in the opinion, dismissing the cause on its merits.

[* 225] * Being of opinion that this cause is destitute of merits, it is ordered that the decree of the district court be reversed, and the petition dismissed.

WYLLYS LYMAN, GEORGE P. MARSH, JOHN PECK, and JOHN H. PECK,
Plaintiffs in Error, v. THE PRESIDENT, DIRECTORS, AND COMPANY
OF THE BANK OF THE UNITED STATES.

12 H. 225.

In an action to recover the consideration of a sale and conveyance of real and personal property, for which three notes were given, two of which were admitted to have been paid, and the third was produced and tendered to be given up; *Held*, 1. That the other notes need not be produced; 2. That, as defendants gave their notes for the purchase-money, the presumption was that the conveyances had been made, and the deeds need not be produced; 3. That there was no presumption that the notes were received in satisfaction of the purchase-money.

THE case is stated in the opinion of the court.

Phelps, for the defendants.

No counsel *contra*.

* NELSON, J. delivered the opinion of the court. [*243]

This is a writ of error to the circuit court of the United States for the district of Vermont.

The suit was brought in the court below by the bank against the defendants to recover a balance claimed to be due, of the purchase-money agreed to be given for the property and assets of their branch at Burlington. The amount of the purchase-money was a fraction under one hundred and forty-two thousand dollars, (\$142,000,) payable in instalments; and for securing payment of which four notes of thirty-five thousand five hundred dollars (\$35,500) each, were executed and delivered at the time. These notes were payable to "Samuel Jaudon, Esq., cashier, or order," and had not been indorsed by him to the plaintiffs, nor in blank.

The declaration contained the usual money counts, an account stated, and also counts for the original consideration of the notes.

On the trial, the plaintiffs offered in evidence the last of the series of notes, the previous ones having been paid, for the purpose of sustaining the action, which was objected to on the ground that no title was shown in the bank, the note not having been indorsed. This objection was sustained and the note excluded, but the plaintiffs were permitted to recover under the count for the original consideration.

The question, therefore, whether or not it was competent to connect the plaintiffs with the note by parol evidence, that it had been given to their cashier, and was their property, is not in the case, and need not be passed upon.

It was objected at the trial that the plaintiffs could not recover under the counts for the original consideration, on the ground that the notes had been received in payment and satisfaction of the indebtedness; and hence the recovery must be upon the notes themselves, if at all. But the court held that the mere acceptance of the notes by the bank did not necessarily operate as a satisfaction; and that, whether or not there was an agreement at the time to receive them in satisfaction, or whether the circumstances attending the transactions warranted such an inference, were questions for the jury; and submitted the questions accordingly.

It was also objected that, in order to entitle the plaintiffs to recover under the counts for the original consideration, they must first produce all the previous notes given for the purchase-money, and surrender them in court. And, further, that, before there could be a recovery for that portion of the consideration, consisting of the real estate, the plaintiffs were bound to prove the execution and delivery of the conveyances of the same to the defendants. But the [* 244] court held, as to the first objection, that, *as it was conceded on both sides that the previous notes had been paid, the presumption of law was, they had been given up by the holder at the time of payment, as the party was not bound, as a general rule, to make the payment, without receiving the note as his voucher; and that, if the fact was otherwise, the burden lay upon the defendants to show it. And as to the second objection, inasmuch as the contract had been executed, and the defendants had given their notes for the purchase-money, the court was bound to presume that they were satisfied with the execution on the part of the plaintiffs, and, of course, that the proper conveyances had been made and delivered, and that, if the fact was otherwise, it was incumbent upon the defendants to show it.

This court is of opinion that no error was committed in either of the various rulings at the circuit to which we have referred, nor, indeed, as it respects either of the other questions in the case, not thus far particularly noticed; but which appear upon the record.

Those remaining that bear upon the merits of the defence, and which we propose to notice, relate to two items of indebtedness upon the books of the branch bank at Burlington—the debt of Truesdell and Son, of \$4,884.48, and of Silas E. Burrows, of \$2,538.86. These items were among those on the list of suspended debts made out by the cashier of the branch preparatory to the negotiation for a purchase by the defendants of its assets, and to the settlement of the terms of sale by the parent bank. They were of considerable standing at the branch, and had been previously returned by the directors

to the parent bank in several semi-annual returns as not only bad but desperate, and were inserted in what was called the list of suspended debts, amounting in the aggregate to a fraction short of \$27,000 preparatory to the sale, and for which the defendants offered, and the plaintiffs accepted, five thousand dollars, (\$5,000.)

These two items, it was insisted, should be credited to the account of the defendants, inasmuch as they had been compromised, as was contended, and settled by the plaintiffs before or after the time of purchase; and that, as they had been inserted in the list of suspended debts, the defendants had reason to believe, when they made the purchase, they were outstanding existing demands, though of doubtful value.

It was admitted, by the counsel for the plaintiffs, that, if his clients had compromised either of these debts, or had received any portion of them since the sale, they would be responsible for the fair value of the demands or the money received, at the election of the defendants. But that, if these demands, or either of them, had been compromised, and closed previously to the sale to [* 245] the defendants, by the board of directors of the branch at Burlington, inasmuch as there was no warranty of the debts, and two of the purchasers were members of the board, and, of course, cognizant of the compromise, and settlement, all the defendants being joint purchasers, were chargeable with knowledge, and, therefore, there was no ground for an implied fraudulent representation on account of these two items having been inadvertently placed on the suspended list.

It was also urged by the counsel for the plaintiffs, that the condition of the debts on the books at the Burlington branch must have been well known to the board of directors there—much better known to them, than to the board of the parent bank; and, that the latter must necessarily have relied mainly upon information derived from the former as to the condition of the assets, with a view to make an estimate of their value.

The court took this view of the case at the trial, and left the facts to the jury. And, upon a review here, it is the opinion of this court, that no error was committed in the direction.

The facts were, that the Truesdell debt had been compromised by the directors of the branch at Burlington, with the assent of the parent bank, more than a year previous to the sale to the defendants, and the original debt discharged; and the better opinion from the evidence is, that the amount for which the debt was compromised was paid at the Burlington branch previous to the sale. At all events, there is no evidence whatever that any part of it has been received by the

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parent bank since that time. If it has been paid since, it must have been paid to the defendants who held the substituted paper under the transfer of the assets of the branch.

Under these circumstances, we think, the defendants were bound to show, in order to entitle themselves to the credit for this item of the suspended debts, that the parent bank had either received the money on it or had appropriated the securities so as to make them their own since the sale. And, as there was no evidence warranting either conclusion, it follows, the direction of the court below was right.

As it respects the Silas E. Burrows debt—it appears that this debt was compromised at 33½ per cent. as early as May, 1835; and the original securities surrendered on taking the new security for \$922.17. This security has never been interfered with by the parent bank; and if unpaid at the time of the sale, remained in full force at that time, and since, in the hands of the defendants.

The parent bank subsequently, in December, 1840, compromised a large indebtedness of Burrows, but in this, and all other [* 246] *subsequent negotiations with him, they expressly excluded the debt at the Burlington branch, as no longer under their control.

For these reasons we are satisfied the judgment of the court below is right, and should be affirmed.

THE UNITED STATES, Plaintiffs in Error, v. JOSEPH B. WILKINSON, CHRISTOPHER ROSELIOUS, JOHN L. LEWIS, LOUIS BRINGIER, MANDEVILLE MARIGNY, and JOHN R. GRYMES.

12 H. 246.

If a record declare that a bill of exceptions was taken on the trial of a case, this will control an erroneous date attached to the bill of exceptions, according to which it was signed before the trial.

A copy of an official bond, duly authenticated according to the act of congress of July 2, 1836, § 15, (5 Stats. at Large, 82,) is admissible in evidence.

THE case is stated in the opinion of the court.

Crittenden (attorney-general,) for the plaintiffs.

Johnson, with whom were *Benjamin*, and *Micon*, contra.

[* 251] *TANEY, C. J., delivered the opinion of the court.

This action was brought against the defendants in error as sureties in the official bond of William M'Queen, who was appointed postmaster at New Orleans in 1840.

The proceeding was by petition according to the practice in Louisiana, and a copy of the bond was set forth in the petition, and also annexed to and filed with it, and the United States alleged that McQueen had received, as postmaster, twenty thousand and sixty dollars and ninety-two cents, which he had neglected and refused to pay over.

The defendants, in their answers, took three grounds of defence:—

1. They admitted their several signatures to the bond set forth in the petition, but denied that it had ever been delivered by them or accepted by the postmaster-general.

2. That there had been a former recovery against them for the same cause of action.

3. That the suit was barred by limitations, not having been instituted against the sureties within two years after the default of the postmaster.

At the trial, the jury found a verdict for the defendant, and judgment was entered accordingly, and the United States have brought this writ of error upon the judgment.

It appears by the record duly certified to this court, that the following exception was taken:—

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Bill of Exceptions.

The UNITED STATES	}	No. 1727.
v.		
J. B. WILKINSON <i>et al.</i>		

* *In the circuit court of the United States, for the fifth circuit [* 252]
sitting for the eastern district of New Orleans.*

Present, Hon. T. H. McCaleb, Judge of the district court, presiding alone.

April term, 1848.

Be it remembered, that at the April term of the circuit court aforesaid, in the year 1848, on Tuesday, the 8th day of April, 1848, on the trial of the above-named cause, the attorney of the United States offered in behalf of the said United States to [be] read in evidence to the jury a certain instrument, being a bond annexed to the petition or information in this cause, being an authentic copy [of] a bond signed by William McQueen as principal, and the parties herein defendant as sureties, for the faithful discharge of the duties of the office of postmaster at New Orleans, dated on the eighth day of June, in the year one thousand eight hundred and forty; to the reading in

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evidence of which bond the counsel of defendants objected, and the court sustained the objection, and refused to allow the document to be read.

Whereupon the attorney of the United States excepted to the ruling of the court, and tenders this as his bill of exceptions, praying that the same may be signed by the court, and made a part of this record.

THEO. H. M'CALEB. [SEAL.]

U. S. Judge.

This exception, it will be observed, states that it was taken on the 8th day of April, 1848; and the record shows that the suit was not instituted until the 11th of July in that year, and that the trial took place on the 7th and 8th of May, 1849; and that the verdict was rendered on the day last mentioned.

It is insisted on behalf of the defendants that, as this exception is stated to have been taken on the 8th of April, 1848, more than a year before the trial, it cannot be regarded by this court as an exception legally taken, nor noticed in its judgment. And, further, that if it be considered as an exception regularly taken and certified, yet the opinion of the court rejecting the testimony was correct.

The exception is certainly very loosely framed, and the date above mentioned cannot be reconciled with the rest of the record. It is evidently a clerical mistake, arising, most probably, from the pressure and hurry of business, which is sometimes unavoidable in a court of original jurisdiction. For the titling at the head of the exception states it to be taken in No. 1727, which is the number by which this suit appears to have been marked in the circuit court throughout the proceedings; and in the body of the exception it is said

[* 253] to be offered at the trial. * There is nothing in the record from which it can be inferred that a suit was pending between the same parties on the 8th of April, 1848. And this exception is regularly certified by the circuit court as a part of the proceedings in this case, and as one taken at the trial. This certificate from the circuit court, is conclusive upon this court, and the exception must be regarded as duly taken and regularly brought up by the writ of error.

With respect to the opinion excepted to, we can see no ground for rejecting the testimony. The exception in substance states that the district attorney offered to read in evidence a certain instrument, annexed to the petition, being an authentic copy of a bond signed by the defendants, as sureties for McQueen. It is admitted by the answers, that the defendants had signed the original bond of which this is a copy; and, moreover, the copy offered is said to be authentic.

The possession of the original bond by the proper officers of the United States, was *prima facie* evidence that it had been delivered and accepted. The bond was a necessary part of the evidence in behalf of the United States, and as the copy was duly authenticated, according to the act of congress, we are at a loss to understand upon what ground it could have been rejected.

It is said that there might have been objections which do not appear in the exception, and that every presumption is to be made in favor of the judgment of the inferior court, and that it is to be presumed right until the contrary appears. This is true. But the contrary does appear in the present case. If, indeed, the exception had merely stated that the plaintiff offered a certain paper without describing it, or without showing its application to the matter in controversy, and the court had rejected it without stating the grounds of its decision, undoubtedly the judgment would be presumed to be correct.

But here the paper is shown by the statement in the exception to be legally admissible. The error, therefore, is apparent; and no presumption can be made in favor of a judgment, where the error is apparent on the record.

If there was any fact which, notwithstanding the authentication of the copy, made it inadmissible, it ought to have been shown by the defendants, and set forth in the exception. And where no such fact appears, it must be presumed not to exist. A contrary rule would make the right to except of no value to the party, and would put an end to the revisory power of the appellate court whenever the inferior tribunal desired to exclude it,—*De non apparentibus et de non existentibus eadem est ratio*, is an old and well-established maxim in legal proceedings, and is founded on principles of justice as well as of law. And for error *in rejecting the testimony [*254] which upon the facts in the exception ought to have been received, the judgment of the circuit court must be reversed.

JOSHUA B. BOND, Administrator of MARY ANN CADE, Plaintiff in
Error, v. JAMES BROWN.

12 H. 254.

If a case at law in Louisiana, is submitted to the judge without a jury, and no exception is taken to any ruling on any matter of law, the finding is conclusive, and the judgment must be affirmed on error.

THE case is stated in the opinion of the court.

Marr, for the defendant.

No counsel *contra*.

[* 255] *TANEY, C. J., delivered the opinion of the court.

The record in this case is voluminous; but a very brief statement will show the grounds upon which it is decided in this court.

The suit was brought by the defendant in error in the circuit court of the United States for the eastern district of Louisiana, upon a bond with a collateral condition. The breaches for which he sued are set out in the petition. The plaintiff in error answered, [* 256] denying some of the material facts stated in the *petition, and alleging other facts, which, if supported by testimony, were sufficient to bar the recovery.

Upon these issues the parties proceeded in the case, and evidence on both sides was offered, which is stated at large in the record. And, as neither party demanded a jury, the fact as well as the law was, according to the Louisiana practice, submitted to the court.

The plaintiff in error has not presented any argument in this court, nor assigned any particular error of which he complains. None of the testimony on either side appears to have been objected to in the circuit court. Nor does it appear, from the pleadings, or by exception, or by the opinion of the court, that any question of law arose or was decided in the case. On the contrary, the opinion of the court, inserted in the record, according to the Louisiana practice, states that, being satisfied that the defendant in error had fully substantiated the allegations in his petition, the court proceeded to give judgment in his favor. The language of the opinion, when taken in connection with the pleadings and issues, implies that the case turned upon the comparative weight of the testimony; upon the fact, and not upon the law. And, whether the fact was rightly decided or not, according to the evidence, is not open to inquiry in this court. The decision of the court below, in this respect, is as conclusive as the verdict of a jury when the case is brought here by writ of error. And, as no error in law appears in the record, the judgment of the circuit court must be affirmed.

Dundas v. Hitchcock. 12 H.

JANES DUNDAS, MORDECAI D. LEWIS, SAMUEL W. JONES, ROBERT L. PITTFIELD, and ROBERT HOWELL, Appellants, v. ANNE HITCHCOCK.

12 H. 256.

A clause releasing the right to dower was inserted in an indenture after the signatures, of both husband and wife, and began: "And I, A. H., wife of H. H., &c." *Held*, That it was a part of the same deed, and was a valid release under the laws of Alabama.

The law of Alabama does not require the acknowledgment of a *feme covert* to be made in *ipseiisimis verbis*; if it conform in substance to what the statute requires, it is valid.

If a widow, who is also a devisee with a power of sale, release to a purchaser for a valuable consideration, she shall be deemed to convey in every character which enabled her to give effect to her deed; and she cannot set up that she conveyed only under a power; that she disaffirmed the provision for herself in the will, and took her dower, and did not release that.

THE case is stated in the opinion of the court.

Bradley and J. A. Campbell, for the appellants.

Hopkins and Badger, contra.

*GRIER, J., delivered the opinion of the court. [* 265]

The respondent, Mrs. Anne Hitchcock, was complainant below, in two bills filed in the circuit court of Alabama, claiming her dower in certain property in the city of Mobile, of which her late husband, Henry Hitchcock, was seised in his lifetime, and of which the appellants, as trustees of the United States Bank, were in possession, claiming under a mortgage given by said Henry.

The answer admits the marriage of complainant, and the seisin and death of her husband, and that the appellants hold the property under a deed of mortgage from him; but deny that complainant has any right of dower in the premises.

1. Because she was a party to the deed of mortgage, and had relinquished her right of dower by her deed duly executed and acknowledged.

2. That after the death of her husband, the complainant took possession of his property as sole devisee in fee, and surrendered the possession to the mortgagees in satisfaction of the debt, and for a large consideration paid to her, executed a full and absolute release to them of all her right, title, interest, and estate in the mortgaged property.

3. That she was estopped by a decree of the court of Alabama, on a bill filed by the mortgagees for a foreclosure, and to have their title quieted.

If the appellants can succeed in establishing either of these three grounds of defence, they will be entitled to a decree in their favor.

We will therefore consider them in their order.

1. The instrument of mortgage is dated on the 14th of July, 1838. The first part of it is a deed poll in the usual form: "Know all men, &c., that I, Henry Hitchcock, of Mobile, &c., in consideration of the sum of \$620,530.96, to me in hand paid, by these presents do grant, bargain, sell, &c.;" and concluding: "Given under my hand and seal, &c.," and signed, "Henry Hitchcock, Anne Hitchcock," with their respective seals; also these words: "Signed, sealed, and delivered in presence of;" but no names of witnesses annexed.

[* 266] * Under these signatures and attestation is the following release, signed and sealed by Anne Hitchcock: —

"And I, Anne Hitchcock, wife of the said Henry Hitchcock, for and in consideration of the sum of one dollar, to me in hand paid by the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, have relinquished, and hereby do relinquish by these presents, all my right and title of dower in and to the above-described premises, to the said Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, the survivors or survivor of them, and to the heirs, executors, and assigns of such survivor, forever.

"Witness my hand and seal, this fourteenth day of July, one thousand eight hundred and thirty-eight. ANNE HITCHCOCK. [Seal.]

"Attest: Charles A. Marston."

The acknowledgment which appears to have been taken at the same time is as follows: —

"THE STATE OF ALABAMA,
Mobile County.

"Personally appeared before me, Charles A. Marston, notary public in and for said county, the above-named Henry Hitchcock, who acknowledged that he signed, sealed, and delivered the foregoing indenture of mortgage to Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, on the day and year therein mentioned. And also appeared personally before me, Charles A. Marston, Anne Hitchcock, the wife of said H. Hitchcock, who being examined privately and apart from her said husband, acknowledged that she signed, sealed, and delivered the said indenture of mortgage freely, and of her own accord, and without any fear, threats, or compulsion of her said husband.

"Given under my hand and seal notarial, this fourteenth day of July, A. D. 1838.

CHARLES A. MARSTON."

The objections to the sufficiency of this instrument to bar the dower of the wife, are, first, "That the mortgage is the deed of the husband only. It contains no words of grant by the wife; her name is not mentioned in the deed."

2. That the relinquishment of dower is a several and separate deed, which should have the signature of the husband, to show his consent, and that it was the joint act of husband and wife.

3. That the acknowledgment of Mrs. Hitchcock is of "the said indenture of mortgage," and not of her relinquishment of dower.

* And, 4. That the acknowledgment is not in due form [*267] of law.

The first three of these objections are founded on the assumption that the release of Mrs. Hitchcock forms no part of the deed of mortgage, but is a separate and distinct deed. It is true, if that portion of the instrument, above the joint signatures of the husband and wife, is to be construed as the whole indenture of mortgage, the first proposition cannot be denied. For the instrument, thus far, does not purport to dispose of any right or interest vested in the wife; and if nothing further had been added, the deed would have been wholly inoperative for that purpose. But the face of the instrument shows that it does not end there; for it proceeds: "And I, Anne Hitchcock, &c., in consideration of the sum of one dollar to me in hand paid by the said Joseph, &c., do relinquish all my right and title of dower in and to the above-described premises to the said Joseph, &c."

Usually, this initiate and contingent right of dower is barred, in deeds of sale and mortgage, by a conveyance making the grant in the joint names of the husband and wife, in the same manner as if the estate belonged to the wife; the deed operating by way of estoppel when the right of dower becomes complete by the death of the husband. But when the legal estate is vested wholly in the husband, and the right of the wife is but a contingent incumbrance, there is no necessity that she should join in the grant of the fee, the release of her inchoate right acknowledged in due form, being all that is necessary to bar her from setting up a claim of dower, after the death of her husband.

The insertion of the clause of release of dower might generally be considered by conveyancers as in better taste, if it had preceded the signature and attestation of the other covenants which affected the fee of the husband; but there is no stringent unbending rule of law which requires a deed to be in such form, or in any peculiar form, in order to operate as a valid conveyance. The intention of the parties is to be gathered from an inspection of the whole instrument

of assurance taken together. It ought not to be dislocated and rent into separate fragments by a captious or astute construction, whose only result is to defeat the plain meaning and intention of the parties.

The acts of assembly of Alabama concerning conveyances frequently use the phrase "deeds and relinquishments of dower," which is probably the cause or the consequence of this form of conveyancing in that State; and that in popular parlance, a conveyance of land in this form is described as if a "relinquishment of dower" was not a deed, or a portion of the conveyance, assurance, or grant, [* 268] though made at the same time, and forming * a portion of it. The instrument before us, composed of what is popularly called the mortgage and relinquishment of dower, constitutes but one deed or conveyance executed by husband and wife for the purpose of conveying the fee vested in the husband, and releasing the inchoate right of the wife. It was all written on the same paper or parchment, for one purpose, the latter sentences connected with those which precede it, by a copulative conjunction. It was all executed at the same time, and acknowledged by husband and wife at the time of its execution; and they have each signed that portion of the conveyance which purports to grant or release their several interests. The relative position of the signatures of the husband and wife, or the unnecessary duplication of either, is of little importance, where the instrument, by apt and proper terms, clearly shows the intention of the parties, that the husband should convey the fee, and the wife join with him in the deed, for the purpose of releasing her contingent estate of dower. In such cases, and especially where this form of assurance is in common use, the *astutia* of a court would be illy employed in criticizing the form of the conveyance, in order that one of the parties may be enabled to escape from his covenants, and thus wrong and defraud the other.

Let us now examine whether the acknowledgment of the wife is sufficient, according to the statutes of Alabama, to operate as a conveyance or relinquishment of her right of dower.

The act of assembly of Alabama on this subject, Aikin's Digest, 93, § 29, is as follows:—

"No estate of a *feme covert*, in any lands, tenements, or hereditaments, lying and being in this territory, shall pass by her deed or conveyance, without a previous acknowledgment made by her on a private examination apart from her husband, before one of the territorial judges, or one of the justices of the county court, that she signed, sealed, and delivered the same as her voluntary act and deed, freely without any fear, threats, or compulsion of her husband, and a certificate

thereof, written on or under the said deed or conveyance, and signed by the officer before whom it was made; and every deed or conveyance, so executed and acknowledged by a *feme covert*, and certified as aforesaid, shall release and bar her right of dower, and be good and effectual to convey the lands, tenements, and hereditaments thereby intended to be conveyed."

One of the objections to the acknowledgment of Mrs. Hitchcock is, that she acknowledges to have signed and sealed "the said indenture of mortgage," and not that part of it called the "relinquishment of dower." This objection we think is hypercritical. "*Hæret in litera.*" It is founded on the assumption which we have just noticed, that the several covenants signed * by the hus- [*269] band and wife, do not constitute one assurance or deed of mortgage. The same criticism would annul the acknowledgment of the husband, which is, "that he executed the foregoing indenture," whereas the deed signed by him is a deed poll and not an indenture. Surely, no court would declare his acknowledgment invalid for this slight misnomer. It would, certainly, be no great latitude of construction, even if they were separate and distinct instruments, to refer the acknowledgment of the wife to that one which contains her own grant or release, and which she has signed and sealed. Even in cases of doubtful construction, the rule of law is, that the court should construe the instrument *ut res magis valeat*, and not annul it by such fanciful criticism.

It is objected, also, that this acknowledgment is not in the very words of the statute. In place of the words, "as her voluntary act and deed, freely," it substitutes the words, "freely and of her own accord."

That the words of the acknowledgment have the same meaning, and are in substance the same with those used in the statute, it needs no argument to demonstrate; and that such an acknowledgment is a sufficient compliance with the statute to give validity to the deed of the wife, is not only consonant with reason, but, as the cases cited by counsel show, supported by very numerous authorities. The act requires a private examination of the wife to ascertain that she acts freely and not by compulsion of her husband, but it prescribes no precise form of words to be used in the certificate, nor requires that it should contain all the synonymes used in the statute to express the meaning of the legislature. In other acts of the same legislature, where a precise form of acknowledgment of certain deeds is prescribed, it is provided that "any certificate of probate or acknowledgment of any such deed, shall be good and effectual if it contain the substance, whether it be in the form or not, of that set

forth in the first section of this act." Clay's Dig. 153. The legislature have thus shown a laudable anxiety to hinder a construction of their statutes, which would require a stringent adherence to a mere form of words without regard to their meaning or substance, and make the validity of titles to depend on the verbal accuracy of careless scribes.

We are, therefore, of opinion that the certificate of the acknowledgment of the complainant of the deed executed by her, is valid and sufficient in law to bar her claim of dower in the mortgaged premises.

2. But, even if this deed of mortgage were not a sufficient bar to the claim, we are of opinion that the deed of release executed [*270] by the complainant on the 8th of February, 1840, is a complete bar and estoppel to the claim set up in her bill.

Henry Hitchcock died in August, 1839, having first made his will, in which he devises all his estate, real and personal, to the complainant in trust to sell and dispose of the same, and invest it for the use of herself and children, share and share alike. Under this devise, she entered and took possession of the estate of her husband, and, in consideration of the sum of \$150,000, paid to her by the trustees of the bank, and of a release by them of all claim upon the other estate of the deceased, she executed, on the 8th of February, 1840, a deed of release of the mortgaged property, containing the following recitals and covenants. "This indenture, made, &c., between Anne Hitchcock, widow and sole devisee of Henry Hitchcock, acting under and by virtue of the last will and testament of said Henry Hitchcock, duly proved, &c., of the first part, and Joseph Cowperthwaite, &c., of the second part, witnesseth, that the party of the first part, for and in consideration of the sum of \$773,352, &c., hath remised, conveyed, and forever quitclaimed, and doth remise, &c., to the said parties of the second part, all the estate, right, title, interest, use, property, claim, and demand whatsoever, at law as well as in equity, in possession as well as in reversion of, in, to, or out of all and singular, the following-described premises, to wit, &c., &c.: "To have and to hold all and singular the aforesaid lands, tenements, improvements, and appurtenances, unto the said parties of the second part, the survivors and survivor of them, and the heirs, executors, administrators, and assigns of said survivor to their own proper use, benefit, and behoof forever; so that neither the said party of the first part, her heirs or assigns, nor any person or persons whatsoever, in trust for them or her, or in her or their name or names, can or may, by any ways or means whatsoever, hereafter have, claim, challenge, or demand any right, title, interest or estate of, in, to, or out of all and

singular the premises above described, and hereby released and conveyed; but therefrom and thereout are and shall be by these presents forever excluded and debarred."

By the law of Alabama, the widow is allowed one year after probate of the will to make her election, whether to take under it or not. The will of Henry Hitchcock was admitted to probate on the 17th August, 1839, and on the 14th of August, 1840, the widow filed her election, renouncing all benefit under the will and electing to take her dower. This bill was filed on the 29th of April, 1847, nearly seven years afterwards.

She makes no offer in her bill to restore the sum of \$150,000 paid to her or her agent, or to surrender the release given to her by the trustees of the bank which was the consideration paid for her release, but contends that she is remitted to her original rights by her last election, and is not estopped by her deed, which was merely the execution of a power, and could not affect her personal right, or bar her claim to dower in the land conveyed or released.

It is admitted, that the mere equity of redemption of this property was worth nothing; on the contrary, the other property of the mortgagor would have been liable for a large portion of the bond which accompanied the mortgage. Yet, it is contended, that the widow may elect to take under this devise in the will; that, under pretence and belief of such election, she may get her husband's estate released from a debt, and receive a large consideration in money for a release of her title as "sole devisee," and afterwards change her election, defeat all the covenants of her own deed, and yet retain the whole consideration paid for it. It is not worth while to examine what acts of a widow amount to an election *in pais* to take under the will. It is clear she cannot take possession, under the will and sell the title in fee conferred upon her by the devises in it, and then revoke her grant by changing her election within the year. The time given to the widow by the law, to make her election, is intended for her protection, and not that she shall use it as a weapon of offence to defraud others. Courts of equity do not exert their powers, even in favor of widows, to assist them in such a transaction. The deed, executed by the complainant in 1840, is an estoppel, both in law and equity, against this claim of dower. By this deed, she professes to convey, as "widow," "sole devisee," and under the powers vested in her by the will. She releases all claim or demand in law or equity, in possession or expectancy; "so that neither she, nor her heirs, can or may, by any ways or means whatsoever, hereafter have, claim, challenge, or demand any right, title, interest, or

estate in the premises." It is hard to conceive how any conveyancer could devise language more comprehensive, or legal phraseology more stringent, to convey every possible estate of the grantor, and operate as a perfect legal estoppel against all possible claim in any character whatever. If this had been a mere naked power of appointment, or to make a conveyance of the title of the deceased, not coupled with an interest, and the widow had intended merely to exercise such power without affecting her own right in the property, her deed should have been carefully drawn, so as to show on its face an intention to save her own rights, if she did not intend to convey them. For, it is a settled rule of construction, that "whoever conveys to a purchaser, without restraining the operation of his conveyance, shall be deemed to convey in every character, [*272] which enabled him to give effect to his deed." *Sugden on Powers, 82; *Coxe v. Chamberlain*, 4 Ves. Jr. 637, &c.

This case is much stronger against the grantor; for her deed was worthless, unless she had elected to take the devise under the will; and having recited in her deed, that she was "widow and sole devisee," she is thereby estopped from denying that she conveyed all rights held in either character, or, as between her and the grantees, ever asserting that she had not elected to take as sole devisee.

Being, therefore, of opinion that the complainant below is doubly estopped from setting up this claim of dower, it will be unnecessary to consider the third point of defence urged by appellant's counsel, as to the effect of the decree of foreclosure.

The decree of the circuit court is, therefore, reversed, and the bill dismissed with costs.

TRISTRAM CLARK, ROYAL WILLIAMS, EBENEZER M'LELLAN, THOMAS M'LELLAN, and JAMES R. S. WILLIAMS, Claimants of the Bark *Susan W. Lind*, Appellants, v. NATHANIEL BARNWELL and JAMES RAVENEL, Copartners trading under the Firm of BARNWELL AND RAVENEL.

12 H. 272.

Damage done to cotton thread, by dampness of the hold of the vessel, not occasioned by bad stowage, or any negligence of the master, or mariners, is an "accident of navigation," within the exception in a bill of lading.

If damage be done by an accident, or peril, excepted in the bill of lading, the shipper must *prima facie* bear the loss; but he may impose it on the master, or owners, or on the vessel, by proving that the negligence of the master, or mariners, made the excepted peril or accident operative on his goods.

If it is usual to carry salt as part of the cargo of a general ship, it is not negligence to take it on board; and the owner of goods, liable to be injured by its presence in the hold, must bear the loss occasioned thereby, if there was no bad stowage, and no inquiry made by the shipper, before the goods were put on board.

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A carrier is not responsible for the consequences of delay of the voyage not attributable to misconduct of his servants.

A bill of lading, containing the usual clause, "shipped in good order, &c.," and adding "contents unknown," acknowledges only the fair external appearance of the packages, and the burden is on the shipper to prove the condition of their contents when they came on board.

THE case is stated in the opinion of the court.

Evans, for the appellants.

Coze, contra.

* NELSON, J., delivered the opinion of the court. [*279]

This is an appeal from a decree of the circuit court of the district of South Carolina in admiralty.

The libel was filed against the ship *Susan W. Lind* and owners for alleged damage to cargo shipped to the libellants, as consignees, from Liverpool to Charleston, through the neglect and fault of the master. The goods shipped were twenty-four boxes of cotton thread, which on delivery at Charleston, were damaged to the amount of some fifty per cent. The spools of thread were packed in small wooden boxes lined with paper, one hundred dozen in each box, and again inclosed in a large wooden box, six small boxes in each large one, lined with paper between the small boxes. When these boxes were delivered and opened, the spools of thread in each of the small boxes were more or less stained, and spotted by dampness and mould, though the large and small boxes themselves were generally dry, as was also the paper covering the thread.

The respondents in their answer allege, that, if the contents of the boxes were in a damaged state when opened, the damage must have existed, or originated in causes that existed, before they were delivered on board the ship, though not indicated by the external appearance of the boxes; or must have been produced by the effects of the dampness of the atmosphere in the hold of the vessel to which goods, wares, and merchandise are exposed, and, especially such as were shipped for the libellants, in all vessels, however tight and stanch, with cargoes however well stowed, on as long and boisterous a passage as was experienced by *The Susan W. Lind*; or, the same was caused by such dampness in consequence of the neglect of the shipper in not having packed the cotton thread in boxes calculated to exclude the damp air which otherwise it must be subject to in the transportation across the Atlantic.

* The vessel sailed from Liverpool on the fourteenth day [*280] of March, 1848, and arrived at Charleston, her port of destination, on the fourteenth day of May following, making a long

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voyage of sixty-one days, during which she encountered rough weather and violent gales, causing her to labor heavily, and occasionally ship water.

As we have already stated, the cotton thread, when the boxes were delivered to the consignees and opened, was found damaged on account of stains and spots, the effect apparently of dampness and mould happening in the course of the shipment.

The bill of lading admits that the twenty-four boxes were shipped in good order, and bound the respondents to deliver the same in like good order, "all, and every the dangers and accidents of the seas and navigation of whatsoever nature and kind excepted." And the main question in the case is, whether or not the damage in question was occasioned by one of the perils and accidents within this clause of the bill of lading? For, as the masters and owners, like other common carriers, may be answerable for the goods, although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes, which, either according to the general rules of law, or the particular stipulations of the parties, afford an excuse for the non-performance of the contract. After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show, that it was occasioned by one of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show, that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; for, then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence, and inattention to his duty. Hence it is, that, although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him. On this ground, in the case of *Muddle v. Stride*, 9 Car. & Payne, 380, which was an action against the proprietors of a steam vessel to recover compensation for damage to goods sent by them as carriers, Lord Chief Justice Denman, in [*281] *summing up to the jury observed: "If on the whole, it be left in doubt what the cause of the injury was, or, if it may

as well be attributable to 'perils of the sea' as to negligence, the plaintiff cannot recover; but, if the perils of the seas require that more care should be used in the stowing of the goods (articles of silk and linen) on board, than was bestowed on them, that will be negligence for which the owners of the vessel will be liable. That the jury were to see clearly, that the defendants were guilty of negligence before they could find a verdict against them."

Now, applying these principles to the facts disclosed in the record, we shall be enabled to determine whether or not the respondents in the court below are liable for the damage that happened to the goods in question, as they settle, with great clearness, the rule of responsibility, and, also, on which side the burden of proof lies to charge or exonerate them as common carriers. And, on looking into these facts, it will be seen, that all the witnesses concur in the conclusion that the damage was occasioned by the humidity of the atmosphere and dampness of the ship's hold, producing mould and mildew upon the cotton spools, and thereby staining and spotting the thread, impairing its strength, and rendering it unmerchantable. The article appears to be peculiarly subject to the effect of humidity and dampness, as the paper with which it was covered in the small boxes, was generally dry, and unaffected, when at the same time the thread beneath was mildewed and stained, and what is more remarkable, in many instances the upper layers of the spools were perfectly dry and sound, while those lying in the centre were mouldy and spotted; and in other instances, the only part affected were the layers in the centre.

The vessel was a general ship, tight and staunch, well equipped, and manned; and was laden with a mixed cargo, consisting of cases and crates of dry goods, hardware, and about two thousand sacks of salt. The cargo was well stowed and dunnaged. The sacks of salt, when discharged, were dry as usual, and in good condition; and no part of the cargo, except the cases in question, appears to have been injured in the voyage, or the subject of any complaint.

It was insisted on the argument, that the respondents were in fault in taking on board their vessel the goods in question with salt as part of the cargo; but the evidence is full that salt in sacks is part of a mixed cargo of nearly all the vessels engaged in the trade between Liverpool and Charleston. One witness, who has been in the Liverpool trade for ten years, states, that salt is part of the cargo of nine out of ten vessels trading from that port to the United States. Several shipmasters who have been engaged in this trade, state, that salt always constituted a part of their cargo, [* 282] and they never knew any damage occasioned to the other goods. Indeed, the evidence is all one way on this point. In con-

sequence of damage occasionally happening to these goods, and others of like character, in vessels of a mixed cargo of which salt was a part, some merchants latterly gave particular directions to their correspondents not to send their goods in a ship of this description. But this only shows that the general usage of the trade would justify the shipment with salt as part of the cargo, and hence the necessity of the particular instructions.

The weight of the evidence also seems to be, that the presence of salt, as part of the cargo of the ship, does not produce humidity or dampness in the atmosphere; but tends rather to diminish it by attracting and absorbing the humidity; and that unless in contact with the salt, or exposed to the drain from it by bad stowage, no injury would accrue to the other goods.

Some attempt was also made upon the argument to show that the salt was badly stowed, regard being had to the nature and character of the goods in question; and that the damage was properly attributed to this circumstance. But there is no foundation for the argument upon the evidence. The salt was not within thirty feet of the cases of dry goods, with the exception of two cases, which were well dunnaged with matting and an inch board between them and the salt. The spools of thread in these were not damaged more than in the rest of the boxes.

Now the evidence showing very satisfactorily that the damage to the goods was occasioned by the effect of the humidity and dampness, which in the absence of any defect in the ship, or navigation of the same, or in the stowage, is one of the dangers and accidents of the seas for which the carrier is not liable, the burden lay upon the libellants to show, that it might notwithstanding have been prevented by reasonable skill and diligence of those employed in the conveyance of the goods. For, it has been held, if the damage has proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the ship, the merchant must bear the loss as well as pay the freight; as the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event. 12 East, 381; 4 Campb. 119; 6 Taunt. 65; Abbott on Ship. 428, (Shee's ed.) But if it can be shown that it might have been avoided by the use of proper precautionary measures, and that the usual and customary methods for this purpose have been neglected, they may still be held liable. And the same rule applies in the case of damage on account of the humidity and dampness of the ship, which is, more or less, incident to all vessels engaged in trade and navigation,

especially upon the high seas. Notwithstanding, therefore, the proof was clear, that the damage was occasioned by the effect of the humidity and dampness of the vessel, which is one of the dangers of navigation, it was competent for the libellants to show, that the respondents might have prevented it by proper skill and diligence in the discharge of their duties; but no such evidence is found in the record. For aught that appears every precaution was taken that is usual or customary, or known to shipmasters, to avoid the damage in question. And hence we are obliged to conclude that it is to be attributed exclusively to the dampness of the atmosphere of the vessel, without negligence or fault on the part of the master or owners.

No doubt the unusual duration of the voyage, on account of tempestuous weather and adverse winds, in connection with the fact that it was one in which the ship passed from a northern to a southern latitude, and in a season of the year when the change from a cold to a warm climate must have been considerable, greatly increased the dampness, and also the influence of it upon goods liable to damage from that cause.

But the carrier is not responsible for delay in the voyage on account of boisterous weather or adverse winds, low tides, or the like, as was held in the case of *Boyle v. M'Laughlin*, 4 Harr. & J. 291. These are dangers and accidents of the navigation over which he has no control, and against which his contract contains no warranty.

Another point was made on the part of the respondents below, which it may be proper briefly to notice. It was insisted that these goods had not been packed in good condition in the boxes at Paisley by the manufacturer, or if otherwise, that the damage might have happened to them in the conveyance from that place to Liverpool, before they were shipped for Charleston.

The bill of lading contained the usual clause, that they were shipped in good order; but there was added, at the conclusion, "contents unknown."

It is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board, extended only to the external condition of the cases, excluding any implication as to the quantity or quality of the article, condition of it at the time received on board, or whether properly packed or not in the boxes. *Abbott*, 339, (Shee's ed.) p. 216, (Story's ed.) And if the evidence on the part of the defence laid a foundation for a reasonable inference, that the damage resulted from an imperfection in the goods when packed in the cases, or had occurred previously to their being

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[* 284] shipped on board, *the burden was thrown upon the libellants to rebut the inference. It was accordingly assumed in this case, and evidence produced as to the condition of the thread when packed at Paisley, and also in respect to the mode of conveyance from that place to Liverpool, preparatory to the shipment. The explanation is as full perhaps as could be well furnished, or as is usual, under the circumstances, and brings the case down, we think, to the question of damage occasioned by the effect of the humidity and dampness of the vessel in the course of the voyage. We have already expressed our views upon that question, the result of which is that the decree must be reversed.

Taney, C. J., and Wayne, J., dissented.

21 H. 7; 1 B. 156; 1 Wal. 48.

WILLIAM W. TEAL, Plaintiff in Error, v. MARY C. FELTON, by her next Friend, CHARLES T. HICKS.

12 H. 284.

An initial letter, written upon the envelop of a newspaper, is not a "writing or memorandum" forbidden by the 13th or 30th section of the act of March 3, 1825, (4 Stats. at Large, 105, 111;) and a postmaster is not justified thereby in detaining such newspaper from the person to whom it is directed.

Trover lies in a state court for the conversion, to which such unlawful detention amounts.

ERROR to the court of appeals of the State of New York. The case is stated in the opinion of the court.

Dillage, for the plaintiff.

Seward, contra.

[* 289] * WAYNE, J., delivered the opinion of the court.

This suit was brought in a justices' court to recover from the plaintiff in error the value of a newspaper, received by him as postmaster at Syracuse, which he refused to deliver to the defendant in error to whom it was addressed. The plaintiff in error had charged the newspaper with letter-postage, on account of a letter or initial upon the wrapper of it, distinct from the direction. This the defendant refused to pay, at the same time tendering the lawful postage of a newspaper. The postmaster would not receive it, and retained the paper against the will of the defendant; upon that demand and refusal the suit was brought. The action was trover, and the general issue was pleaded. In the course of the trial when the defendant in error, who was plaintiff in the suit below, was introducing testimony in support of his case, the defendant objected to a further examination

of the case by witnesses, upon the ground that the court had not jurisdiction of the case. The objection having been overruled, the trial of the case was continued; and after the plaintiff had proved that he demanded from the defendant the newspaper, tendering the lawful postage, and that the postmaster refused to deliver it to him, he rested his case.

The defendant below then moved for a nonsuit, which having been denied, he offered in evidence a circular from the post-office department of the 4th December, 1846, marked in the record as A, and also the post-office act of 1845.¹ The case was submitted to a jury. A verdict was rendered by it against the defendant, upon which a judgment was entered. The defendant carried the case to the court of appeals, and the judgment of the lower court was affirmed. It is brought to this court by a writ of error. As the court of appeals could not have adjudicated the case without having denied to the defendant a defence which he claimed under a law of the United States, the case is properly here under the 25th section of the judiciary act of 1789.²

The circular from the post-office department is as follows: "The wrappers of all such newspapers, pamphlets, and magazines, when they have reached their destination, should be carefully removed; and if, upon inspection, they are found to contain any manuscript or memorandum of any kind, either written or stamped, or by marks or signs made in any way, either upon any newspaper, &c., &c., or the wrapper upon which it is inclosed, by which information shall be asked or communicated, except the name of the person to whom it is directed, such newspaper, * &c., &c., with the [* 290] wrapper in which it is inclosed, shall be charged with letter-postage by weight."

If the person to whom the newspaper is directed, refuses to pay the letter-postage, the postmaster is directed to transmit the same to the office whence it came, with a request that the person who sent it may be prosecuted for the penalty of five dollars, according to the 30th section of the act of 1825. Those parts of the 30th section mentioned, upon which the circular was issued, and of the 13th section of the act directing that a memorandum which shall be written on a newspaper, shall be charged with letter-postage are: "If any person shall inclose or conceal a letter or other thing, or any memorandum in writing in a newspaper, pamphlet, or magazine, or in any package of newspapers, &c., &c., or make any writing or memorandum thereon, which he shall have delivered in any post-office or

¹ 5 Stats. at Large, 792.

² 1 Ibid. 85.

to any person for that purpose, in order that the same may be carried by post, free of letter-postage, he shall forfeit the sum of five dollars for every such offence, and the letter, newspaper, package, memorandum or other thing, shall not be delivered to the person to whom it is directed until the amount of single letter-postage is paid for each article of which the package is composed. That part of the 13th section of the act mentioned is: "Any memorandum which shall be written on a newspaper or other printed paper, pamphlet, or magazine, and transmitted by mail, shall be charged with letter-postage." 4 Laws of the United States, 105-111. Those parts of the law of 1845, in any way applicable to this case, are the 1st and 2d sections fixing the rates of postage upon letters and newspapers, and the 16th section, which defines a newspaper to be a printed publication issued in numbers, consisting of not more than two sheets, and published at short intervals of not more than a month, conveying intelligence of passing events, and the *bonâ fide* extras and supplements of any such publication. 5 U. S. L. 732, 737.

From the evidence in this case, we do not think that the initial or letter upon the wrapper of the newspaper in this case, subjected it either under the 13th or 30th section of the act of 1825 to letter-postage. Why it was placed there, supposing it not to have been accidental, cannot be found out from this record, and it must have been a meaningless mark to the postmaster. It may have excited a suspicion, that it was a sign arranged between the person sending it and the person to whom it was directed, to convey information of some sort or other, for which letter-postage would have been charged, if it had been conveyed in words. The acts forbids a memorandum in the 13th section; and in the 30th, providing for a penalty, the terms are, "any writing or memorandum," but in neither [* 291] are found, the terms "marks * or signs," as used in the circular. No provision is made for such a case. It must be obvious too, that frauds of that kind cannot be prevented in the transmission of newspapers, without legislation by congress, subjecting newspapers, conveyed by mail, to letter-postage, whenever there shall be, either upon the newspaper or the wrapper of it, any letter, sign, or mark, besides the address of the person to whom it is sent. A single letter or initial upon the wrapper of a newspaper, is neither a memorandum nor a writing, in the sense in which either of those terms are ordinarily used, or as we think they were intended to be used, in the 30th section of the act. Both mean something in words to convey intelligence, a remembrance for one's self or to another. The act speaks of something concealed in a newspaper or package of newspapers, of a writing or memorandum, from which it may be

seen to have been the intention of the sender to convey information clandestinely under the wrapper, or upon it in a form, though not disclosing what it is, which will leave no doubt of his intention. The initial in this case does not seem to have been one or the other. It is not a memorandum certainly, and a single letter of the alphabet can convey no other idea than that it belongs to it, unless it is used numerically. This was not a case in which judgment could be used to determine any fact, except by some other evidence than the letter itself. Nor was it one calling for discretion in the legal acceptance of that term in respect to officers who are called upon to discharge public duties. What was done by the postmaster, was a mere act of his own, and ministerial, as that is understood to be, distinct from judicial. It could not have been the intention of congress to put it in the power of postmasters, upon a mere suspicion raised by a single letter or initial, to arrest the transmission of newspapers from the presses issuing them, or when they were mailed by private hands.

This view of the law, disposes also of that point in the argument, claiming for the postmaster an exemption from the suit of the plaintiff, upon the ground that he was called upon, in the act which he did, to exercise discretion and judgment. In *Kendall v. Stokes*, 3 How. 97, 98, will be found this court's exposition upon that subject, with the leading authorities in support of it. The difference between the two, must at all times be determined by the law under which an officer is called upon to act, and by the character of the act. It is the law which gives the justification, and nothing less than the law can give irresponsibility to the officer, although he may be acting in good faith under the instructions of his superior of the department to which he belongs. Here the instructions exceed the law, as marks and signs of themselves, without some knowledge of their meaning, and *the intention in the use of them, are, as we have said, [* 292] neither memoranda nor writings. *Tracy v. Swartwout*, 10 Pet. 80.

But it is said that the courts of New York had not jurisdiction to try the case. The objection may be better answered by reference to the laws of the United States, in respect to the services to be rendered in the transmission of letters and newspapers by mail, and by the constitution of the United States, than it can by any general reasoning upon the concurrent civil jurisdiction of the courts of the United States, and the courts of the States, or concerning the exclusive jurisdiction given by the constitution to the former.

The United States undertakes, at fixed rates of postage, to convey letters and newspapers for those to whom they are directed, and the postage may be prepaid by the sender, or be paid when either reach

their destination, by the person to whom they are addressed. When tendered by the latter or by his agent, he has the right to the immediate possession of them, though he has not had before the actual possession. If then they be wrongfully withheld for a charge of unlawful postage, it is a conversion for which suit may be brought. His right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for some cause the suit brought is an exception to the general jurisdiction of the court. Now the courts in New York, having jurisdiction in trover, the case in hand can only be excepted from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States, by the constitution of the United States. That such is not the case, we cannot express our view better than Mr. Justice Wright has done in his opinion in this case in the court of appeals. After citing the 2d section of the 3d article of the constitution, he adds: "This is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusion or any attempt to oust the state courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the constitution. The apparent object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary." We will add, that the legislation of congress, immediately after the constitution was carried into operation, confirms the conclusion of the learned judge. We find, in the 25th section of the judiciary act of 1789, under which this case is before us, that such a concurrent jurisdiction in the courts of the States and of the United States was contemplated, for its first provision is for a review of cases adjudicated in the former, "where is drawn in question, the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their [* 293] * validity." We are satisfied that there was no error in the decision of the court of appeals in this case, and the same is affirmed by this court.

JAMES C. ACHISON, Plaintiff in Error, v. JONATHAN HUDDLESON.

12 H. 293.

Under the compact between the United States and the State of Maryland, respecting the Cumberland road, the imposition of a toll of four cents for every passenger carried in a mail-coach is, in effect, the imposition of a tax upon the United States, through the contractors for carrying the mail; and the other requirement, to pay the sum of one dollar for every mail-coach passing a gate, whereof the proprietor does not report the number of passengers, is but a commutation for such tolls; and the law is a violation of that compact, and void.

THE case is stated in the opinion of the court.

Price and Nelson, for the plaintiff.

Frick and McKaig, contra.

* CURTIS, J., delivered the opinion of the court. [* 296]

This action was brought by the defendant in error, as superintendent of that part of the National Road lying within the State of Maryland, to recover a sum of money from the plaintiff in error, as the owner of stage-coaches passing over that road, and conveying passengers and the mails of the United States. The court of appeals for the western shore of the State of Maryland having rendered a final judgment in favor of the plaintiff, the defendant brought the case here by a writ of error, under the twenty-fifth section of the judiciary act.¹

The nature and extent of the compact between the United States and the several States of Ohio,² Virginia,³ Maryland,⁴ and Pennsylvania,⁵ touching the parts of the road lying within the limits of each of those States, having been much considered by this court in the cases of *Searight v. Stokes*, 3 How. 151, and *Neil et al. v. The State of Ohio*, *ibid.* 720, it is only necessary to state some of the conclusions there arrived at, and apply them to the law of Maryland now in question.

In the second of those cases it was decided, that the State of Ohio could not change the tolls fixed by its act, which congress assented to, so as to vary the relative position and privileges of mail-coaches, in regard to tolls, as prescribed by that act.

* This decision is equally applicable to the original act of [* 297] Maryland, to which congress gave its assent; and the first inquiry is, whether the subsequent act of Maryland, now in question, will bear that test. The second section of the law of Maryland, to which congress gave its assent, imposed, among other tolls, the following: "For every chariot, coach, coachee, stage, wagon, phaeton, chaise, or other carriage, with two horses and four wheels, twelve cents; for either of the carriages last mentioned, with four horses, eighteen cents." And, inasmuch as coaches, conveying the mail, were not subject to any toll, there was by this law a discrimination in favor of mail-coaches, their proprietors bearing none of the burden of supporting the road, while the proprietors of other four-horse coaches did bear a part of that burden. On the 10th of March, 1843, the general assembly of Maryland passed the act now under consideration, the material provisions of which are as follows: —

¹ 1 Stats. at Large, 85.

² 4 Ib. 483.

³ Ib. 665.

⁴ Ib. 553.

⁵ Ib.

" An act to amend the act entitled a supplement to an act entitled an act for the preservation and repair of that part of the United States road within the limits of the State of Maryland.

" Sect. 1. Be it enacted, by the general assembly of Maryland, that from and after the passage of this act, there shall be demanded and received, by the toll-collectors on that part of the United States road within the limits of the State of Maryland, from the owner or owners of every passenger or mail-coach or stage passing the gates on said road, the sum of four cents for every passenger carried in the same, for every space of ten miles on said road, and so in proportion for every greater or less distance, which shall be taken and received in lieu of the tolls now established by law on all coaches or stages with four horses passing over said road, and which shall be collected, paid out, and expended, as other tolls on said road are collected, paid out, and expended, under existing laws.

" Sect. 2. And be it enacted, that it shall be the duty of the proprietor, or proprietors, his, her, or their agent, to furnish, under oath, on the first Monday of every month, to the gatekeeper at number one, a list showing the number of passengers transported over said road in their respective coaches, for the month next preceding the time when said list is so returned.

" Sect. 3. And be it enacted, that, in the event of said proprietors or agents failing or refusing to comply with the provisions of the second section of this act, then, and in that case, it shall be the duty of the gatekeeper, at gate number one, to demand of, and receive from, such proprietor or proprietors so failing, the sum of one dollar for each and every stage-coach passing over said road its entire length."

[* 298] * The discrimination which, under the original law, was made in favor of the proprietors of mail-coaches using the road, is not only destroyed by this law, but all toll is removed from the proprietors of other four-horse coaches, and a toll is imposed upon the proprietors of mail-coaches. It was held in both the former decisions, that the stipulation in the compact, that the United States should not thereafter be subject to any expense to maintain the road, was inconsistent with the imposition of a tax upon the contractors for carrying the mail in four-horse coaches, because the United States, requiring the mail to be so carried, would thus indirectly be made, through the enhancement of the price for this service, to bear a part of that burden. The effect of this law of Maryland is, therefore, to impose upon the United States, through the contractors for carrying the mail in four-horse coaches, a tax for the support of the road. It is argued that it is a tax upon the passengers, and not within the

former decisions. But we do not so consider it. It is true, if he were to carry no passengers, and make the required returns of that fact, the proprietor would not be liable under this law to pay any toll. But the regulations of the post-office department require him to take passengers for the security of the mail. If he carry the mail, he must also be a carrier of passengers; and this law would not have imposed a toll dependent upon the carriage of passengers in mail-coaches, unless it considered they would be carried. The real effect and meaning of the law is, therefore, to impose a tax on the proprietor of a four-horse coach which carries the mail, making the amount of that tax depend on the number of passengers carried. Now, the objection is not to the amount, but to the existence, of the tax. Not having the power to impose any tax, it is no answer to say, its amount is regulated by the number of passengers.

This action is brought under the third section of the act to recover, from the proprietor of mail-coaches, the sum of \$1 for every mail stage-coach passing over the road. It is contended this is not a toll, but a penalty, for not complying with the directions contained in the second section of the act, to make returns. We think it more properly a commutation as to amount, for the tolls payable under the first section. It fixes their amount by operation of law, and without regard to the number of passengers carried; and is certainly subject to difficulties quite as great as would attend a demand for the tolls, under the first section.

Our opinion is, that, by reason of the compact between the United States and the State of Maryland, the tolls sued for could not be legally demanded, and that the decision of the court of appeals was erroneous and must be reversed.

AARON B. COOLEY, Plaintiff in Error, v. THE BOARD OF WARDENS OF THE PORT OF PHILADELPHIA, TO THE USE OF THE SOCIETY FOR THE RELIEF OF DISTRESSED PILOTS, THEIR WIDOWS AND CHILDREN, Defendants. SAME v. SAME.

12 H. 299.

Laws for the regulation of pilots and pilotage, are not laws laying imposts, or duties, on imports, or exports, or tonnage, within the meaning of the tenth section of the first article of the constitution of the United States, if they do not pass the appropriate line which limits laws for the regulation of the pilots and pilotage; and they cannot be considered as passing that line because they require the payment of half pilotage fees by certain vessels, which decline to receive a pilot, and not by others, nor because the sums thus received go to form a charitable fund for distressed or decayed pilots, their widows and children.

▲ regulation of pilots and pilotage is a regulation of commerce, within the grant to congress

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of the commercial power, contained in the eighth section of the first article of the constitution.

The mere grant to congress of the power to regulate commerce, did not prevent the States from regulating pilots; and the legislation of congress, with a single exception, is such, that state regulations may be made, without conflicting with the will of congress in making regulations, or in leaving individuals to their own unrestricted action.

THE case is stated in the opinion of the court.

Morris and Tyson, for the plaintiffs.

St. George Tucker Campbell, and *Dallas*, contra.

[* 311] * CURTIS, J., delivered the opinion of the court.

These cases are brought here by writs of error to the supreme court of the commonwealth of Pennsylvania.

They are actions to recover half-pilotage fees under the 29th section of the act of the legislature of Pennsylvania, passed on the second day of March, 1803. The plaintiff in error alleges that the highest court of the State has decided against a right claimed by him under the constitution of the United States. That right is, to be exempted from the payment of the sums of money, demanded pursuant to the state law above referred to, because that law contravenes several provisions of the constitution of the United States.

The particular section of the state law drawn in question is as follows:—

“ That every ship or vessel arriving from, or bound to any foreign port or place, and every ship or vessel of the burden of seventy-five tons or more, sailing from, or bound to any port not within the River Delaware, shall be obliged to receive a pilot. And it shall be the duty of the master of every such ship or vessel, within thirty-six hours next after the arrival of such ship or vessel at the city of Philadelphia, to make report to the master-warden of the name of such ship or vessel, her draught of water, and the name of the pilot who shall have conducted her to the port. And when any such vessel shall be outward bound, the master of such vessel shall make known to the wardens the name of such vessel, and of the pilot who is to conduct her to the capes, and her draught of water at that time. And it shall be the duty of the wardens to enter every such vessel in a book to be by them kept for that purpose, without fee or reward. And if the master of any ship or vessel shall neglect to make such report, he shall forfeit and pay the sum of \$60. And if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel, shall forfeit and pay to the warden aforesaid, a sum equal to the half-pilotage of such ship or

vessel, to the use of the Society for the Relief, &c., to be recovered as pilotage in the manner hereinafter directed: Provided always, that where it shall appear to the warden that, in case of an inward bound vessel, a pilot did *not offer before she had [* 312] reached Reedy Island; or, in case of an outward bound vessel, that a pilot could not be obtained for twenty-four hours after such vessel was ready to depart, the penalty aforesaid, for not having a pilot, shall not be incurred." This is one section of "An Act to establish a Board of Wardens for the Port of Philadelphia, and for the Regulation of Pilots and Pilotages, &c.," and the scope of the act is, in conformity with the title, to regulate the whole subject of the pilotage of that port.

We think this particular regulation concerning half-pilotage fees, is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial States and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned argument of the counsel for the defendant in error; and their fitness, as part of a system of pilotage, in many places, may be inferred from their existence in so many different States and countries. Like other laws, they are framed to meet the most usual cases, *quæ frequentius accidunt*; they rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them; upon the policy of discouraging the commanders of vessels from refusing to receive such persons on board at the proper times and places; and upon the expediency, and even intrinsic justice, of not suffering those who have incurred labor, and expense, and danger, to place themselves in a position to render important service generally necessary, to go unrewarded, because the master of a particular vessel either rashly refuses their proffered assistance, or, contrary to the general experience, does not need it. There are many cases, in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial States and countries have made an offer of pilotage service one of those cases; and we cannot pronounce a law which does this, to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage, as to be deemed, for this cause, a covert attempt to legislate upon another subject under the appearance of legislating on this one.

It is urged that the second section of the act of the legislature of Pennsylvania, of the 11th of June, 1832, proves that the State had

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other objects in view than the regulation of pilotage. That section is as follows:—

“And be it further enacted, by the authority aforesaid, that from and after the first day of July next, no health-fee or half-pilotage shall be charged on any vessel engaged in the Pennsylvania coal trade.”

[* 313] * It must be remembered, that the fair objects of a law imposing half-pilotage when a pilot is not received, may be secured, and at the same time some classes of vessels exempted from such charge. Thus, the very section of the act of 1803, now under consideration, does not apply to coasting vessels of less burden than seventy-five tons, nor to those bound to, or sailing from, a port in the River Delaware. The purpose of the law being to cause masters of such vessels as generally need a pilot, to employ one, and to secure to the pilots a fair remuneration for cruising in search of vessels, or waiting for employment in port, there is an obvious propriety in having reference to the number, size, and nature of employment of vessels frequenting the port; and it will be found, by an examination of the different systems of these regulations, which have from time to time been made in this and other countries, that the legislative discretion has been constantly exercised in making discriminations, founded on differences both in the character of the trade, and the tonnage of vessels engaged therein.

We do not perceive any thing in the nature or extent of this particular discrimination in favor of vessels engaged in the coal trade, which would enable us to declare it to be other than a fair exercise of legislative discretion, acting upon the subject of the regulation of the pilotage of this port of Philadelphia, with a view to operate upon the masters of those vessels, who, as a general rule, ought to take a pilot, and with the further view of relieving, from the charge of half-pilotage, such vessels as from their size, or the nature of their employment, should be exempted from contributing to the support of pilots, except so far as they actually receive their services. In our judgment, though this law of 1832 has undoubtedly modified the 29th section of the act of 1803, and both are to be taken together as giving the rule on this subject of half-pilotage, yet this change in the rule has not changed the nature of the law, nor deprived it of the character and attributes of a law for the regulation of pilotage.

Nor do we consider that the appropriation of the sums received under this section of the act, to the use of the society for the relief of distressed and decayed pilots, their widows and children, has any legitimate tendency to impress on it the character of a revenue law. Whether these sums shall go directly to the use of the individual

pilots by whom the service is tendered, or shall form a common fund, to be administered by trustees for the benefit of such pilots and their families as may stand in peculiar need of it, is a matter resting in legislative discretion, in the proper exercise of which the pilots alone are interested.

For these reasons, we cannot yield our assent to the argument, that this provision of law is in conflict with the second * and third clauses of the tenth section of the first article of [*314] the constitution, which prohibit a State, without the assent of congress, from laying any imposts or duties, on imports or exports, or tonnage. This provision of the constitution was intended to operate upon subjects actually existing and well understood when the constitution was formed. Imposts and duties on imports, exports, and tonnage were then known to the commerce of the civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial States enforced their pilot-laws, as they were from charges for wharfage or towage, or any other local port-charges for services rendered to vessels or cargoes; and to declare that such pilot-fees or penalties are embraced within the words imposts or duties on imports, exports, or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language. It cannot be denied that a tonnage duty, or an impost on imports or exports, may be levied under the name of pilot dues or penalties; and certainly it is the thing, and not the name, which is to be considered. But, having previously stated that, in this instance, the law complained of does not pass the appropriate line which limits laws for the regulation of pilots and pilotage, the suggestion, that this law levies a duty on tonnage or on imports or exports, is not admissible; and, if so, it also follows, that this law is not repugnant to the first clause of the eighth section of the first article of the constitution, which declares that all duties, imposts, and excises shall be uniform throughout the United States; for, if it is not to be deemed a law levying a duty, impost, or excise, the want of uniformity throughout the United States is not objectionable. Indeed, the necessity of conforming regulations of pilotage to the local peculiarities of each port, and the consequent impossibility of having its charges uniform throughout the United States, would be sufficient of itself to prove that they could not have been intended to be embraced within this clause of the constitution; for it cannot be supposed uniformity was required, when it must have been known to be impracticable.

It is further objected, that this law is repugnant to the fifth clause of the ninth section of the first article of the constitution, namely:—

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"No preference shall be given by any regulation of commerce or revenue, to the ports of one State over those of another; nor shall vessels, to or from one State, be obliged to enter, clear, or pay duties in another."

But, as already stated, pilotage fees are not duties within the meaning of the constitution; and, certainly, Pennsylvania does not give a preference to the port of Philadelphia, by requiring [* 315] * the masters, owners, or consignees of vessels sailing to or from that port, to pay the charges imposed by the twenty-ninth section of the act of 1803. It is an objection to, and not a ground of preference of a port, that a charge of this kind must be borne by vessels entering it; and, accordingly, the interests of the port require, and generally produce, such alleviations of these charges as its growing commerce from time to time renders consistent with the general policy of the pilot laws. This State, by its act of the 24th of March, 1851, has essentially modified the law of 1803, and further exempted many vessels from the charge now in question. Similar changes may be observed in the laws of New York, Massachusetts, and other commercial States, and they undoubtedly spring from the conviction that burdens of this kind, instead of operating to give a preference to a port, tend to check its commerce, and that sound policy requires them to be lessened and removed as early as the necessities of the system will allow.

In addition to what has been said respecting each of these constitutional objections to this law, it may be observed, that similar laws have existed and been practised on in the States since the adoption of the federal constitution; that, by the act of the 7th of August, 1789, 1 Stats. at Large, 54, congress declared that all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States, &c.; and that this contemporaneous construction of the constitution since acted on with such uniformity in a matter of much public interest and importance, is entitled to great weight, in determining whether such a law is repugnant to the constitution, as levying a duty not uniform throughout the United States, or, as giving a preference to the ports of one State over those of another, or, as obliging vessels to or from one State to enter, clear, or pay duties in another. *Stuart v. Laird*, 1 Cranch, 299; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. The Commonwealth of Virginia*, 6 Wheat. 264, *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 621.

The opinion of the court is, that the law now in question is not repugnant to either of the above-mentioned clauses of the constitution.

It remains to consider the objection, that it is repugnant to the third clause of the eighth section of the first article. "The congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the *nature of the service performed by pilots, to the relations [*316] which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first congress assembled under the constitution passed laws, requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. 1 Stats. at Large, 55, 131. These have been from time to time added to and changed, and we are not aware that their validity has been questioned.

Now, a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage-ground, is the temporary master charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies a most important and responsible place among those thus engaged. And if congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can perceive no valid reason why the pilot should be beyond the reach of the same power. It is true that, according to the usages of modern commerce on the ocean, the pilot is on board only during a part of the voyage between ports of different States, or between ports of the United States and foreign countries; but if he is on board for such a purpose and during so much of the voyage as to be engaged in navigation, the power to regulate navigation extends to him while thus engaged, as clearly as it would if he were to remain

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on board throughout the whole passage, from port to port. For it is a power which extends to every part of the voyage, and may regulate those who conduct or assist in conducting navigation in one part of a voyage as much as in another part, or during the whole voyage.

Nor should it be lost sight of, that this subject of the regulation of pilots and pilotage has an intimate connection with, and an important relation to, the general subject of commerce with [* 317] * foreign nations and among the several States, over which

it was one main object of the constitution to create a national control. Conflicts between the laws of neighboring States, and discriminations favorable or adverse to commerce with particular foreign nations, might be created by state laws regulating pilotage, deeply affecting that equality of commercial rights, and that freedom from state interference, which those who formed the constitution were so anxious to secure, and which the experience of more than half a century has taught us to value so highly. The apprehension of this danger is not speculative merely. For, in 1837, congress actually interposed to relieve the commerce of the country from serious embarrassment, arising from the laws of different States, situate upon waters which are the boundary between them. This was done by an enactment of the 2d of March, 1837,¹ in the following words :—

“ Be it enacted, that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot said vessel to or from said port, any law, usage, or custom to the contrary notwithstanding.”

The act of 1789, 1 Stats. at Large, 54, already referred to, contains a clear legislative exposition of the constitution by the first congress, to the effect that the power to regulate pilots was conferred on congress by the constitution ; as does also the act of March the 2d, 1837, the terms of which have just been given. The weight to be allowed to this contemporaneous construction, and the practice of congress under it, has, in another connection, been adverted to. And a majority of the court are of opinion, that a regulation of pilots is a regulation of commerce, within the grant to congress of the commercial power, contained in the third clause of the eighth section of the first article of the constitution.

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

¹ 5 Stats. at Large, 153.

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The act of congress of the 7th of August, 1789, § 4, is as follows:—

“That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress.”

If the law of Pennsylvania, now in question, had been in existence at the date of this act of congress, we might hold it to
*have been adopted by congress, and thus made a law of [*318] the United States, and so valid. Because this act does, in effect, give the force of an act of congress, to the then existing state laws on this subject, so long as they should continue unrepealed by the State which enacted them.

But the law on which these actions are founded, was not enacted till 1803. What effect then can be attributed to so much of the act of 1789, as declares, that pilots shall continue to be regulated in conformity, “with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress?”

If the States were divested of the power to legislate on this subject by the grant of the commercial power to congress, it is plain this act could not confer upon them power thus to legislate. If the constitution excluded the States from making any law regulating commerce, certainly congress cannot regrant, or in any manner reconvey to the States that power. And yet this act of 1789 gives its sanction only to laws enacted by the States. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a State acting in its legislative capacity, can be deemed a law, enacted by a State; and if the State has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views, we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to congress, did *per se* deprive the States of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded, it must be because the nature of the power, thus granted to congress, requires that a similar authority

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should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the constitution, (Federalist, No. 32,) and [* 319] *with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations. *Sturges v. Crowninshield*, 4 Wheat. 193; *Houston v. Moore*, 5 Wheat. 1; *Wilson v. Blackbird Creek Co.* 2 Pet. 251.

The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, a plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain. The act of 1789 contains a clear and authoritative declaration by the first congress, that the nature of this subject is such, that

until congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789, as declares that pilots shall continue to be regulated "by such laws as the States may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the States a power to legislate, of which the constitution had deprived *them, is allowed an appropriate and important significance. [* 320] It manifests the understanding of congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. How, then, can we say, that by the mere grant of power to regulate commerce, the States are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of congress must be exclusive. This would be to affirm, that the nature of the power is, in this case, something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by congress, while the nature of one of the subjects of that power, not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the States, in conformity with the circumstances of the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive, by affirming of the power, what is not true of its subject now in question.

It is the opinion of a majority of the court that the mere grant to congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although congress has legislated on this subject, its legislation manifests an intention, with

a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of congress, or may be regulated by the States in the absence of all congressional legislation; nor to the general question, how far any regulation of a subject by congress, may be deemed to operate as an exclusion of all legislation by the States upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the State in which the legislation of congress has left it. We go no further.

[* 321] * We have not adverted to the practical consequences of holding that the States possess no power to legislate for the regulation of pilots, though in our apprehension these would be of the most serious importance. For more than sixty years this subject has been acted on by the States, and the systems of some of them created and of others essentially modified during that period. To hold that pilotage fees and penalties demanded and received during that time, have been illegally exacted, under color of void laws, would work an amount of mischief which a clear conviction of constitutional duty, if entertained, must force us to occasion, but which could be viewed by no just mind without deep regret. Nor would the mischief be limited to the past. If congress were now to pass a law adopting the existing state laws, if enacted without authority, and in violation of the constitution, it would seem to us to be a new and questionable mode of legislation.

If the grant of commercial power in the constitution has deprived the States of all power to legislate for the regulation of pilots, if their laws on this subject are mere usurpations upon the exclusive power of the general government, and utterly void, it may be doubted whether congress could, with propriety, recognize them as laws, and adopt them as its own acts; and how are the legislatures of the States to proceed in future, to watch over and amend these laws, as the progressive wants of a growing commerce will require, when the members of those legislatures are made aware that they cannot legislate on this subject without violating the oaths they have taken to support the constitution of the United States?

We are of opinion that this state law was enacted by virtue of a power, residing in the State to legislate, that it is not in conflict with any law of congress; that it does not interfere with any system which congress has established by making regulations, or by inten-

tionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the supreme court of Pennsylvania in each case must be affirmed.

M'Lean, J., and Wayne, J., dissented; and Daniel, J., although he concurred in the judgment of the court, yet dissented from its reasoning.

M'LEAN, J. It is with regret that I feel myself obliged to dissent from the opinion of a majority of my brethren in this case.

As expressing my views on the question involved, I will copy a few sentences from the opinion of Chief Justice Marshall, in the opinion in *Gibbons v. Ogden*. "It has been said," says that *illustrious judge, "that the act of August 7, 1789, [* 322] acknowledges a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with congress to regulate commerce with foreign nations and amongst the States." But this inference is not, we think, justified by the fact.

"Although congress," he continues, "cannot enable a State to legislate, congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned, adopts this system and gives it the same validity as if its provisions had been specially made by congress. But the act, it may be said, is prospective also, and the adoption of laws to be in future presupposes the right in the maker to legislate on the subject.

"The act unquestionably manifests an intention to leave this subject entirely to the States, until congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by congress. But this section is confined to pilots within the bays, inlets, rivers, harbors, and ports of the United States, which are, of course, in whole or in part, also within the limits of some particular State. The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject, to a considerable extent; and the adoption of its system by congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the States so to apply it of their own authority. But the adoption of the state system being temporary, being only "until further legislative provision shall be made by congress," shows conclusively an

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opinion that congress could control the whole subject, and might adopt the system of the States or provide one of its own.

Why did congress pass the act of 1789, adopting the pilot laws of the respective States? Laws they unquestionably were, having been enacted by the States before the adoption of the constitution. But were they laws under the constitution? If they had been so considered by congress, they would not have been adopted by a special act. There is believed to be no instance in the legislation of congress, where a state law has been adopted, which, before its adoption, applied to federal powers. To suppose such a case, would be an imputation of ignorance as to federal powers, least of all chargeable against the men who formed the constitution and who best understood it.

Congress adopted the pilot laws of the States, because [* 323] it was *well understood, they could have had no force, as regulations of foreign commerce or of commerce among the States, if not so adopted. By their adoption they were made acts of congress, and ever since they have been so considered and enforced.

Each State regulates the commerce within its limits; which is not within the range of federal powers. So far, and no further, could effect have been given to the pilot laws of the States, under the constitution. But those laws were only adopted "until further legislative provisions shall be made by congress."

This shows that congress claimed the whole commercial power on this subject, by adopting the pilot laws of the States, making them acts of congress; and also by declaring that the adoption was only until some further legislative provision could be made by congress.

Can congress annul the acts of a State passed within its admitted sovereignty? No one, I suppose, could sustain such a proposition. State sovereignty can neither be enlarged nor diminished by an act of congress. It is not known that congress has ever claimed such a power.

If the States had not the power to enact pilot laws, as connected with foreign commerce, in 1789, when did they get it? It is an exercise of sovereign power to legislate. In this respect the constitution is the same now as in 1789, and also the power of a State is the same. Whence, then, this enlargement of state power? Is it derived from the act of 1789, that pilots shall continue to be regulated "in conformity with such laws as the States may respectively hereafter enact?" In the opinion of the chief justice, above cited, it is said, congress may adopt the laws of a State, but it cannot enable a State to legislate. In other words, it cannot transfer to a state legis-

lative powers. And the court also say that the States cannot apply the pilot laws of their own authority. We have here, then, the deliberate action of congress, showing that the States have no inherent power to pass these laws, which is affirmed by the opinion of this court.

Ought not this to be considered as settling this question? What more of authority can be brought to bear upon it? But it is said that congress is incompetent to legislate on this subject. Is this so? Did not congress, in 1789, legislate on the subject by adopting the state laws, and may it not do so again? Was not that a wise and politic act of legislation? This is admitted. But it is said that congress cannot legislate on this matter in detail. The act of 1789 shows that it is unnecessary for congress so to legislate. A single section covers the whole legislation of the States, in regard to pilots. Where, then, is the necessity of recognizing this power to exist in the States? There is no such necessity; and if there were, it would not make the *act of the State constitutional; for it is admitted [* 324] that the power is in congress.

That a State may regulate foreign commerce, or commerce among the States, is a doctrine which has been advanced by individual judges of this court; but never before, I believe, has such a power been sanctioned by the decision of this court. In this case, the power to regulate pilots is admitted to belong to the commercial power of congress; and yet it is held, that a State, by virtue of its inherent power, may regulate the subject, until such regulation shall be annulled by congress. This is the principle established by this decision. Its language is guarded, in order to apply the decision only to the case before the court. But such restrictions can never operate so as to render the principle inapplicable to other cases. And it is in this light that the decision is chiefly to be regretted. The power is recognized in the State, because the subject is more appropriate for state than federal action; and consequently, it must be presumed the constitution cannot have intended to inhibit state action. This is not a rule by which the constitution is to be construed. It can receive but little support from the discussions which took place on the adoption of the constitution, and none at all from the earlier decisions of this court.

It will be found that the principle in this case, if carried out, will deeply affect the commercial prosperity of the country. If a State has power to regulate foreign commerce, such regulation must be held valid, until congress shall repeal or annul it. But the present case goes further than this. Congress regulated pilots by the act of 1789, which made the acts of the State, on that subject, the acts

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of congress. In 1803, Pennsylvania passed the law in question, which materially modified the act adopted by congress; and this act of 1803 is held to be constitutional. This, then, asserts the right of a State, not only to regulate foreign commerce, but to modify, and, consequently, to repeal a prior regulation of congress. Is there a mistake in this statement? There is none, if an adopted act of a State is thereby made an act of congress, and if the regulation of pilots, in regard to foreign commerce, be a regulation of commerce. The latter position is admitted in the opinion of the court, and no one will controvert the former. I speak of the principle of the opinion, and not of the restricted application given to it by the learned judge who delivered it.

The noted Blackbird Creek case, 2 Pet. 245, shows what little influence the facts and circumstances of a case can have in restraining the principle it is supposed to embody.

How can the unconstitutional acts of Louisiana, or of any other State which has ports on the Mississippi, or the Ohio, or
* 325] * on any of our other rivers, be corrected, without the action of congress? And when congress shall act, the State has only to change its ground, in order to enact and enforce its regulations. Louisiana now imposes a duty upon vessels for mooring in the river opposite the city of New Orleans, which is called a levee tax, and which, on some boats performing weekly trips to that city, amounts to from \$3,000 to \$4,000 annually. What is there to prevent the thirteen or fourteen States bordering upon the two rivers first named, from regulating navigation on those rivers, although congress may have regulated the same at some prior period? I speak not of the effect of this doctrine theoretically in this matter, but practically. And if the doctrine be true, how can this court say that such regulations of commerce are invalid? If this doctrine be sound, the passenger cases were erroneously decided. In those cases there was no direct conflict between the acts of the States taxing passengers and the acts of congress.

From this race of legislation between congress and the States, and between the States, if this principle be maintained, will arise a conflict similar to that which existed before the adoption of the constitution. The States favorably situated, as Louisiana, may levy a contribution upon the commerce of other States, which shall be sufficient to meet the expenditures of the States.

The application of the money exacted under this act of Pennsylvania, it is said, shows that it is not raised for revenue. The application of the money cannot be relied on as showing an act of a State to be constitutional. If the State has power to pass the act, it may apply the money raised in its discretion.

I think the charge of half pilotage is correct under the circumstances, and I only object to the power of the State to pass the law. Congress, to whom the subject peculiarly belongs, should have been applied to, and no doubt it would have adopted the act of the State.

DANIEL, J. I agree with the majority in their decision, that the judgments of the supreme court of Pennsylvania in these cases should be affirmed, though I cannot go with them in the process or argument by which their conclusion has been reached. The power and the practice of enacting pilot laws, which has been exercised by the States from the very origin of their existence, although it is one in some degree connected with commercial intercourse, does not come essentially and regularly within that power of commercial regulation vested by the constitution in congress, and which by the constitution must, when exercised by congress, be enforced with perfect equality, and without any kind of discrimination, *local or [*326] otherwise, in its application. The power delegated to congress by the constitution relates properly to the terms on which commercial engagements may be prosecuted; the character of the articles which they may embrace; the permission or terms according to which they may be introduced; and do not necessarily nor even naturally extend to the means of precaution and safety adopted within the waters or limits of the States by the authority of the latter for the preservation of vessels and cargoes, and the lives of navigators or passengers. These last subjects are essentially local—they must depend upon local necessities which call them into existence, must differ according to the degrees of that necessity. It is admitted, on all hands, that they cannot be uniform or even general, but must vary so as to meet the purposes to be accomplished. They have no connection with contract, or traffic, or with the permission to trade in any subject, or upon any conditions. They belong to the same conservative power which undertakes to guide the track of the vessel over the rocks or shallows of a coast, or river; which directs her mooring or her position in port, for the safety of life and property, whether in reference to herself or to other vessels, their cargoes and crews, which for security against pestilence subjects vessels to quarantine, and may order the total destruction of the cargoes they contain. This is a power which is deemed indispensable to the safety and existence of every community. It may well be made a question, therefore, whether it could, under any circumstances, be surrendered; but certainly it is one which cannot be supposed to have been given by mere implication, and as incidental to another, to the exercise of which it is not indispensable. It is not just nor philosophical to argue from

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the possibility of abuse against the rightful existence of this power in the States; such an argument would, if permitted, go to the overthrow of all power in either the States or in the federal government, since there is no power which may not be abused. The true question here is, whether the power to enact pilot laws is appropriate and necessary, or rather most appropriate and necessary to the state or the federal governments. It being conceded that this power has been exercised by the States from their very dawn of existence; that it can be practically and beneficially applied by the local authorities only; it being conceded, as it must be, that the power to pass pilot laws, as such, has not been in any express terms delegated to congress, and does not necessarily conflict with the right to establish commercial regulations, I am forced to conclude that this is an original and inherent power in the States, and not one to be merely tolerated, or held subject to the sanction of the federal government.

19 H. 898; 1 B. 427, 608; 2 Wal. 450; 3 Wal. 718; 6 Wal. 85.

SAMUEL SMYTH v. STRADER, PEVINE, AND Co.

12 H. 327.

A writ of error which did not set out the names of all the parties to the judgment of the circuit court, was dismissed.

ERROR to the southern district of Alabama.

Pryor, for the motion.

It appearing to the court here that this writ of error is vicious and defective, inasmuch as it does not set out the names of all the parties to the judgment of the circuit court, it is thereupon, on the motion of Mr. Pryor, of counsel for the defendants in error, now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed, with costs.

16 H. 142.

UNION BANK OF LOUISIANA, Complainants and Appellants, v. JOSIAH S. STAFFORD and JEANNETTA KIRKLAND, his Wife, Defendants.

12 H. 327.

Under the charter of the Union bank of Louisiana, it was held, that a married woman could and did bind her property by a contract of borrowing jointly with her husband, whatever might be the general law of Louisiana on the subject.

Under the law of Louisiana, the sale of property under execution, on a twelve months' credit, neither satisfies the judgment, nor novates the debt.

The Texas statute of limitations of actions upon contracts, or for the detention of personal property, have no application to a bill in equity to foreclose a mortgage; equity does not allow the mortgagor to set up his possession as adverse to the mortgagee.

When proper parties are not within the jurisdiction, and a decree may be made without affecting their interests, the plaintiff is excused from joining them by the first section of the act of February 28, 1839, (5 Stats. at Large, 321.)

APPEAL from the district court of the United States for the district of Texas. The case is stated in the opinion of the court.

Hale, and *Coxe*, for the appellants.

Harris, contra.

* GRIER, J., delivered the opinion of the court. [* 336]

The Union Bank of Louisiana filed a bill in the district court of the United States for Texas, claiming the seizure and sale of certain negro slaves which had been mortgaged to them by the defendants in Louisiana, and afterwards removed to Texas. The bill was dismissed by the court below for want of proper parties, and the complainants have appealed to this court. It will be necessary to select, from the voluminous record of the case, only so much of the allegations in the pleadings and of the evidence connected therewith, as will exhibit the several points of law which have been argued and relied upon in this court.

The bill sets forth a mortgage made by the respondents through their attorney to the complainants, dated on the 6th of June, 1837, to secure the payment of a loan of \$45,000, payable in one year from its date. Among other things, this mortgage included 102 slaves, with their increase. When this mortgage became due, the defendants refused to pay, and opposed the sale of the slaves, on the ground that, at the time of its execution, Mrs. Stafford was a minor. After some time, a compromise was effected between the parties by the intervention of friends. The bank accepted the notes of J. S. Stafford for about twenty thousand dollars of their debt, and Mrs. Stafford joined her husband in a mortgage on the same property for the sum of \$30,000, payable, the interest annually, and the principal in annual instalments, *commencing on the first of March, [* 337] 1844, and ending in 1851. This mortgage is dated on the 22d of May, 1841. It recites the original mortgage of 1837, acknowledges the loan of \$45,000 by the bank to respondents "for the purpose of assisting them in their pecuniary matters and for the particular purpose of paying debts due by the wife." It recites that the wife being now of full age, "is anxious to do away with any vice, defect, or informality which might vitiate or impair the previous mortgage," and thereby "approves, ratifies, and confirms it to the amount and extent of \$30,000, so that the two instruments shall be considered as one mortgage." Isaac Thomas also intervened and became a party to this mortgage, in his own right, and as administrator of Michah P. Flint, stating that Stafford had given a mortgage to Flint in his

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lifetime on a part of these negroes, (dated 9th June, 1836,) to secure him for indorsements, and likewise a mortgage to said Thomas and Flint, dated 22d of April, 1837, for \$100,000 for the same purpose; and agreeing to release and discharge both these mortgages so far as to give priority to the mortgage to the Union Bank. "This waiver and postponement by said Thomas, however, being made without prejudice to the rights acquired by him in a portion (about 48 in number) of the above-named slaves, at a sheriff's sale of the property at the suit of the New Orleans Canal and Banking Company on the 8th day of August, 1840."

The bill further alleges, (and this allegation is fully proved by the evidence in the cause,) that these slaves remained in the possession of the respondents from the date of the mortgage till February, 1845, when they were fraudulently removed by them to the State of Texas for the purpose of evading the payment of this and other debts secured upon them; and that Stafford has threatened to remove them out of that State to Mexico if such a step should be necessary to prevent them from being seized to satisfy his debts.

To prevent this, a receiver was appointed by the court, and by means of a writ of assistance, a part of the slaves have been taken into his possession with much difficulty and at great expense.

The answer of Mrs. Stafford admits the mortgages, and that the slaves have been brought to Texas, and that she holds them in her possession, subject to the order of the court. Without attempting to give an abridgment of the various matters alleged in this answer, we shall proceed to notice the several points of defence made by counsel in the argument, stating the allegations, and facts which tend to elucidate them; without regarding the order or peculiar statement of them in the answer.

I. Was this mortgage valid and effectual to pass or bind [* 338] the * interest, "property, and right of the wife, whether dotal or of any other description?"

In the decision of this question, it is not necessary to take into consideration the doctrines of the civil law or of the Louisiana Code, art. 2412, concerning the power of the wife to bind herself as surety for the debts of her husband; as we are of opinion that the 25th section of the act of April 2, 1832, incorporating the Union Bank of Louisiana, is conclusive upon this point. It is as follows:—

"Sect. 25. Be it further enacted, &c., that, in all hypothecary contracts and obligations entered into by any married individual, with or in favor of said Union Bank of Louisiana, or with any of its offices of discount and deposit, according to the true intent and meaning of this act, it shall be lawful for the wife of the said indi-

vidual to bind and oblige herself jointly and *in solido* with him; and in such case, the property and right of the wife, whether dotal or of any other description, shall be affected by the said contracts or obligations: Provided, that the said wife be of the age of majority at the time of entering into such obligations or contracts."

Now, it is admitted that, when the latter instrument of mortgage was executed, the wife was of full age.

That it is a hypothecary contract for the loan of money by the bank, is evident from the face of the deed. And if the recital in the mortgage, that it was given for a loan of money, be not conclusive evidence of that fact, the testimony in the case fully shows that the consideration of it was the loan of \$45,000, which was set to the credit of Stafford on the books of the bank, and drawn out by his checks. The purpose to which this money was applied, was a matter with which the bank had no concern, and which cannot affect the validity of its security.

This instrument was a public act, duly acknowledged, and was therefore a binding contract or obligation, to affect the "property and right of the wife, whether dotal or of any other description," and by the laws of Louisiana, operated as a judgment, with lien on the property specially described in it. See *Bank of Louisiana v. Farrar*, 1 Ann. Rep. 49.

2. It is alleged, in the answer, that this contract of mortgage has been novated and extinguished.

The facts on which this objection rest are as follows: The instrument of mortgage contains a covenant that, "in case of failure on the part of the mortgagors to pay any or either of said instalments, or any or either of the amounts of interest, it shall be sufficient cause to foreclose the same and enforce the payment by such legal process as the nature of the case shall *or may require." [* 339] The mortgagors, having failed to make any payment of the annual instalments of interest, in April, 1843, the bank obtained an order of seizure and sale of the mortgaged property. According to the usual course of proceeding in such cases, when the sheriff cannot obtain a bid for cash, to the amount of two thirds of the appraised value of the property, it is again offered for sale on a credit of one year, the purchaser giving what is called a twelve months' bond; and if the purchase-money be not paid in that time, the mortgagee may have an order of seizure and sale on this bond. On this last sale, the property is sold for cash (subject to all previous liens) to the highest bidder. In this case, the mortgaged property was bid off by William M. Stafford, a brother of respondents'; he gave his twelve months' bond; the property remained, as usual, in the possession of

the respondents; and no part of the purchase-money was paid at the end of the year. The bank then issued process for a final sale of the property to the highest bidder, for cash. The lands included in the mortgage were sold; but the negroes were fraudulently carried off by the defendants to Texas. The amount for which the lands sold did not satisfy the first instalment of the principal of the mortgage, due in March, 1844.

The question which arises on these facts is, whether this sale to William M. Stafford, and his twelve months' bond, is a novation or extinguishment of the original mortgage. If it was, the complainants should have filed their bill on the twelve months' bond, which operated as a judgment and mortgage on the property, and not on the original mortgage, as has been done in this case.

"A novation takes place in three ways." Louis. Code, art. 2185. "1. When a debtor contracts a new debt to his creditor, which new debt is substituted to the old one, which is extinguished. 2. When a new debtor is substituted to the old one, who is discharged by the creditor. 3. When, by the effect of a new engagement, a new creditor is substituted to the old, with regard to whom the debtor is discharged."

Whether this twelve months' bond operates as a novation, and discharges the mortgage or judgment without actual payment or satisfaction, is a question depending so entirely on the peculiar laws of Louisiana, that we must look alone to the decisions of the tribunals of that State for its solution. The cases of *Offut v. Hendsley*, 9 Louis. Rep. 1; *Reboul v. Behrens*, *ibid.* 90; and *Dunlap v. Sims*, 2 Ann. Rep. 239, are directly in point on this question. In the latter case, the court says: "No principle is better settled in our law than that a sale of property under execution, on a credit of twelve months, neither satisfies the judgment nor novates the debt."

[*340] *On this point of defence, therefore, we must decide, that the sale to William M. Stafford and his twelve months' bond, (which it is admitted has never been paid,) did not novate or extinguish the lien or debt secured by the original mortgage to the bank. This result is consonant with the true equity and justice of the case, as it is transparently clear, from the whole transaction, that William M. Stafford's interposition in this matter was merely to gain further time for the respondents, he being wholly unable to satisfy the debt of the bank, according to the tenor of his bond. His transfer of the negroes to Mrs. Stafford, or to M^r Waters as her trustee, left the case, as between these parties, in precisely the same position as it stood at first. The negroes always remained in possession of respondents, subject to the lien of the mortgage, notwithstanding this complication of sales and nominal transferees.

3. The respondent, both by her pleas and in her answer, sets up the statute of limitations of Texas as a bar to the proceeding in this case; she relies, first, on the section which limits all actions of debt, upon any contract in writing, to four years; and, secondly, "that all actions for detaining personal property, or for converting such property to one's own use, shall be commenced and sued within two years next after the cause of such action or suit, and not after;" and alleges that "she has converted the slaves to her own use, and held them adversely to the complainant, from the 9th of April, 1845, until after the commencement of this suit, that is to say, for more than two years before the filing of this bill."

However much it may be the policy of Texas (as it is alleged in the cases of *Love v. Dock*, and *Snodely v. Cage*, lately decided in the supreme court of that State) to give a liberal construction to their statutes of limitation in favor of debtors, for the purpose of encouraging immigration, it is abundantly apparent that these sections can have no application to a bill in equity to enforce the sale of mortgaged property, whether the slaves in question be considered either as personalty or realty.

The first of the eight instalments of the principal debt became due on the 1st of March, 1844, and the last in 1851; and the bill was filed in February, 1848, less than four years after the first instalment became due; so that, if this were an action of debt, the plea could apply only to the instalments of interest payable before 1844. And, in such an action, it would be no answer to this objection to the plea of the statute, that the creditor had a right to sell the mortgaged property on the failure or neglect of the mortgagor to pay the first instalment. In cases of concurrent jurisdiction, courts of equity are said to act in obedience to the statutes of limitation, and in other cases they act "upon the analogy of the limitations of [*341] law. A bill to foreclose a mortgage and enforce the sale of the mortgaged property has no analogy to an action of *trover*, *detinue*, or *trespass*. The claim of the mortgagee is a *jus ad rem*, not a *jus in re*. He does not claim as owner of the property. The possession of the mortgagor is not adverse, but under the mortgagee. And, although this species of realty is movable, and may be carried away or fraudulently concealed from the pursuit of the mortgagee, such acts cannot be alleged in a court of equity as an adverse possession, which will defeat the lien of the creditor after two years, in analogy to the limitation of actions at law for taking and carrying away or converting to one's own use the property of another. A chancellor will not permit a party to plead his own fraud to defeat the equity of the complainant. This plea must, therefore, be overruled.

4. The court below decided the three points of defence which we have just considered, against the respondents, but dismissed the bill of complainants for want of proper parties.

This constitutes the fourth and last ground of defence which has been urged in the argument of the case in this court.

It is contended that William M. Stafford, James A. M'Waters, and Isaac Thomas should have been made parties to this bill, and that without such parties the court cannot proceed to a decree in favor of complainants.

It is admitted that William M. Stafford, James A. M'Waters, and Isaac Thomas reside in the State of Louisiana, and out of the jurisdiction of the court. And it is contended that, as the complainant cannot therefore compel them to become parties, he is utterly remediless, notwithstanding the original mortgagors are in court, and have in their possession the property subject to the lien of his mortgage.

It is true that, if these persons had been within the jurisdiction of the court, they might properly have been made parties; but there is no decree sought against either of them, nor will a decree in favor of the complainants affect any rights which they may have.

It is unnecessary, in the consideration of this point, to bring under review the doctrines advanced on this subject in treatises on equity practice and pleadings, or cases decided in England or elsewhere. The act of congress of 28th of February, 1839, is conclusive of this point. It enacts "that, where, in any suit at law or in equity commenced in any court in the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to enter-
[* 342] tain jurisdiction and proceed * to trial and adjudication of such suit between the parties who may be properly before it. But the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of the parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit." Notwithstanding the complication of mortgages, sales, and transfers of the slaves now in question, it must be observed that they have never been out of the possession of the respondents till seized with a strong hand by the marshal on a writ of assistance, and delivered to the receiver appointed in this case. And, as we have seen, the transfer to William M. Stafford by the sheriff, on his giving a twelve months' bond, left them still subject to the lien of the mortgagees, as the bond was never paid. The transfer from Stafford to M'Waters, for the

separate use of Mrs. Stafford, one of the original mortgagors, did not affect the rights of the mortgagees; neither Stafford nor M'Waters have or claim any beneficial interest in the property. M'Waters was examined as a witness, and might have been made a party if he chose. It would be a strange perversion of justice, if the remedy on a mortgage could be defeated by transfers of this description to persons living out of the jurisdiction of the court. If this act of congress had never been passed, a court of equity would not suffer the remedy of a mortgagee to be defeated by such a scheme.

If it were true that Isaac Thomas still retained his claim to forty-eight of the slaves included in the mortgage, it would be no reason why the complainant should not be entitled to his decree as against the respondents, leaving Thomas to prosecute his claims, if he had any, at such time and in such manner as he might elect. But the plea set up in the answer on this point must be taken with the facts connected with it, as alleged by the respondent, in connection with the testimony of Thomas himself, who was examined as a witness in the case. By these, it appears that the New Orleans Canal and Banking Company had a previous mortgage for \$10,000 on these forty-eight slaves, executed by Stafford and wife; that a writ of seizure and sale issued thereon, and these slaves were sold to Isaac Thomas, who left them in possession of the respondents, but never paid for them; that the slaves were then sold as the property of Thomas, and purchased by one Flint, who afterwards released his right to the Canal Bank, who sold to William M. Stafford, who transferred his right to M'Waters in trust for Mrs. Stafford. It appears also, by the record, that the Canal Bank have filed their bill, claiming their lien on these slaves, who are in the hands of the receiver appointed in this case, and who, by arrangement between *the parties, holds them subject to their respective [* 343] rights. The Canal Bank, though not formally made a party to this bill, is in court claiming its rights through Thomas. The court have therefore before them all the parties claiming any beneficial interest in these slaves, and before they distribute the proceeds of the mortgaged property, can compel the parties interested either to settle their respective claims amicably, or by action, or interpleader, and thus make a final decision binding on all the parties who have any claim to the property.

The decision of the district court, dismissing the bill for want of proper parties, must therefore be reversed, and the record remitted to the court below, with directions to enter a decree in favor of the complainants, and have such further proceeding as to justice and equity may appertain.

NEW ORLEANS CANAL AND BANKING COMPANY, Appellants, v. JOSIAH S. STAFFORD and JEANNETTA KIRKLAND, his Wife.

12 H. 343.

The preceding decision affirmed and applied to this case.

APPEAL from the district court of the United States for the district of Texas. This case depended on the same principles and involved the same subject-matter as the preceding case. •

Crittenden, (attorney-general,) for the appellants.

Harris, contra.

[* 344] * GRIER, J., delivered the opinion of the court.

The New Orleans Canal and Banking Company filed their bill in the district court of the United States for Texas against Josiah S. Stafford and wife, setting forth that the bank, by an act of contract of sale and mortgage made on the 12th of July, 1844, in the parish of Rapides and State of Louisiana, sold to William Mainer Stafford thirty-three negro slaves, which the bank had purchased at a sheriff's sale of the property of Isaac Thomas, at the suit of Adelia E. Flint. By this act of sale and mortgage, William M. Stafford covenanted to pay, as the price of the slaves, the sum of \$12,853, with interest in eight annual instalments. That, in addition to the vendor's privilege reserved on the slaves sold, William M. Stafford further mortgaged his interest in some other slaves which said Stafford had purchased on the 6th of November, 1843, at a sheriff's sale at the suit of the Union Bank of Louisiana. That Stafford agreed that, in case any of the instalments were not paid when they severally became due, then the bank might obtain an order of seizure and sale, (or judgment in the ordinary way at their option,) and sell the mortgaged premises to the highest bidder, without benefit of appraisement. That the respondents, with full notice of this act of sale and mortgage and of the claims of the complainant, fraudulently removed and transported all the slaves to Texas, and now hold and detain them, and endeavor to scatter and secrete them, for the purpose of evading the just claims of complainant. That the slaves are now in possession of the court by a receiver in a certain suit pending between the Union Bank of Louisiana and the respondents. That four of the notes secured by complainant's mortgage are due and payable, and remain unpaid. That William M. Stafford has no property in Louisiana; that he resides in the State of Louisiana, and

without the jurisdiction of the court, and cannot therefore be made a party to the bill.

* This bill was taken *pro confesso* against the husband. [* 345] The wife filed an answer in which she admits the contract of sale and mortgage between the bank and William M. Stafford, but alleges a purchase of them by James A. M'Waters, who holds them by a deed of trust for her separate use. She claims that she is a *feme covert*, and that, by the laws of Louisiana, she has a lien upon all the slaves in the bill mentioned for the security of her matrimonial, dotal, and paraphernal rights, to the amount of \$66,000. She admits the slaves were all brought to Texas, except five, four of whom are dead, and that the others are now in possession, or ordered to be delivered to a receiver appointed by the court at the suit of the Union Bank of Louisiana, and prays that the bill may be dismissed, because William M. Stafford, James A. M'Waters, and the Union Bank are not made parties to the bill.

To meet the allegation of matrimonial, dotal, and paraphernal rights, the complainants amended their bill and gave in evidence a mortgage by respondents, duly acknowledged to bar the rights of the wife, dated 11th May, 1836; and including the thirty-three slaves now in question, with some others. Also, that an order of seizure and sale of forty-five negroes, including these thirty-three, was regularly issued, and the slaves sold to General Isaac Thomas, on the 8th of August, 1840.

That, on the 15th of September, 1840, Thomas mortgaged them again to the bank to secure the payment of ten thousand dollars. That, in November, 1842, Adelia E. Flint, by execution on a judgment which had a lien on the property of Thomas anterior to the mortgage of the bank, sold at sheriff's sale thirty-three of said negroes, which were purchased and paid for by the Canal Bank in 1844.

The amended answer of the wife sets up the defence, that she was a minor in 1836, and therefore the first mortgage to the bank was not valid to bind or affect her rights; she pleads, also, the statute of limitation of two years, averring that, since the slaves were brought to Texas, she has held them adversely to the claim of the mortgagee. But there is no evidence on the record to show that she was a minor in 1836, or that William M. Stafford sold the slaves in question to M'Waters, or that M'Waters had any title to them whatever. That the slaves were carried to Texas by respondent's husband clandestinely, to avoid the pursuit of creditors, is also satisfactorily proved.

The defences made on the argument in this court were:—

1. The minority of the plaintiff.

This was an allegation of the answer not responsive to the bill and there was no proof to substantiate it.

The statement of a witness, in his cross-examination, [* 346] that he * heard Stafford say his wife was not of age in 1836, was not responsive to any question proposed to him by the respondents, and is no evidence of the fact.

2. The charter of the Canal Bank, complainant, has a section in the same words with that which we have noticed in the opinion just delivered in the case of the Union Bank; and what we have said in that case, as to the power of the wife to join her husband in such securities to the bank, equally applies to the present case, and need not be repeated.

3. The plea of the statute of limitations has also been disposed of in the preceding case.

4. What was said in the previous case, as to the propriety of dismissing the bill for want of proper parties, equally applies to this.

The forty-five slaves sold to Thomas, including the thirty-three now in question, were never taken from the possession of respondents; and, though Thomas proves that he offered a reward of \$500 he was unable to get information by which to distinguish or sever them from the other slaves in possession of respondents. Hence, we see the reasons for these transfers to William M. Stafford, the younger brother of respondents, who was without means to pay; and the very liberal terms given by the bank were evidently for the purpose of favoring the defendants, and leaving the slaves in their possession. We cannot shut our eyes also to the fact that respondents were the real actors and persons interested in all these manifold and complicated mortgages, sales, and transfers, which all seemed to have but one result, to wit, that the respondents kept possession of the slaves, and never paid their debts. And having clandestinely carried them away, and attempted to scatter and conceal them from the pursuit of their creditors, it would be a reproach to a court of equity, if it could be truly said that it was unable to afford the complainants a remedy, because the nominal and insolvent obligee in the mortgage lived in a different State from those who, in combination with him, have transported the mortgaged property within the bounds of a different jurisdiction.

The difficulty arising from the conflicting claims of the Union Bank can be settled by the court, as we have already shown in our opinion in that case. In fact, this bill is itself in the nature of an intervention, setting up the claim of complainants to property already in possession of the court. And the court have it fully in their power to compel the banks to interplead with one another as to the

priority of their lien or rights to the property or its proceeds; as each of them has shown a right to a decree as against the title of the respondents, they will be indifferent as to the result, unless the property shall produce more than sufficient to pay both mortgages.

*The decree of the district court is therefore reversed, and [* 347] the record remitted with directions to enter a decree in favor of complainant, and cause such other proceedings as to justice and equity may appertain.

ABRAHAM RICH and JAMES HARRIS, Claimants of the Ship Martha, her Tackle, Apparel, and Furniture, Appellant, v. CHARLES LAMBERT and ROBERT LAMBERT, Copartners, Trading under the Firm of LAMBERT AND BROTHER, and others. SAME v. SOUTH CAROLINA RAILROAD COMPANY.

12 H. 347.

Where separate libels were filed by shippers of goods, and consolidated by order of court; and also where several shippers joined originally in one libel; the object of each being to recover a several compensation for injury done to his goods, from some cause for which the carrier was responsible. *Held*, That to test the right to appeal, each cause of damage must be considered separately; and if the damage awarded to a particular shipper, did not exceed \$2,000, there could be no appeal as to his cause.

Where the circuit court issued a commission to take evidence in an admiralty cause, pending in this court by appeal, and both parties joined in executing it, a proper order of the circuit court, or consent of the parties to dispense with the order, must be presumed.

A question of fact as to the cause of damage to goods in the hold of a vessel.

THE case is stated in the opinion of the court.

Hunt and Evans, for the appellants.

Coxe and Butler, contra.

*NELSON, J., delivered the opinion of the court. [* 352]

This is an appeal from a decree of the circuit court of the United States, held in and for the district of South Carolina in admiralty.

The several libels were filed in the district court, against the ship Martha, by the owners of cargo brought in the same from Liverpool to Charleston, for damage done to the goods in the course of the voyage.

Five of the separate owners of cargo joined in one of the libels, and each of the others filed separate libels; to each of which answers were put in by the respondents, and the parties proceeded in the usual way to take their proofs. Pending the proceedings, all the cases were consolidated by an order of the court on the motion of the proctors for the libellants.

The district court held the respondents liable, as carriers, for the damage done to the goods; and referred the cases to the clerk to take the necessary proofs, and ascertain the loss which each of the several parties had sustained, and report the amount, which was done accordingly. And, in the coming in of the report, a decree was entered adjudging to each of the fifteen several owners the amount of the loss they had respectively sustained.

On an appeal by the respondents to the circuit court, this decree was affirmed. And the cases are now before us on an appeal to this court from that decree.

With the exception of two of the cases, the sum decreed against the respondents in favor of the several owners of the cargo is below the amount that authorizes an appeal to this court. And, it is insisted, on the part of the appellees, that the appeal should be dismissed for want of jurisdiction as to all parts of the decree, except the part relating to the two cases mentioned.

On the part of the appellants, it is contended, that the objection to the jurisdiction is not available to the five separate owners joining in the libel, as the aggregate amount decreed to them exceeds \$2,000; nor to any of the parties, on the ground that all the cases were consolidated by the orders of the district court on the motion of the proctors for the libellants.

We are of opinion that neither of these grounds are sufficient to maintain the jurisdiction, and that the appeal must be dismissed [*353] as to all the cases except the two in each of which the amount in the decree exceeds the \$2,000.

The joining of several owners of cargo conveyed in the same ship in a libel *in rem* for damages done to the goods in the course of shipment, and the consolidation of libels filed separately by the respective owners for like damage, is allowed by the practice of the court for its convenience, and the saving of time and expense to the parties. It is a practice deserving commendation and encouragement in all cases where it can be adopted without complicating too much the proceedings, and thereby prejudicing the rights of the parties.

In cases where the several claims against the ship are founded upon a common injury and loss, the questions involved depending upon the same general rules of law, and the same evidence equally applicable to all of them, it is fit and proper that the proceedings should be joint, either by allowing the parties to unite in the libel, or by an order for consolidation, if separate suits have been instituted.

The defence will usually be the same in all the cases; but, if otherwise, the parties will not be prejudiced, as they may avail themselves in the answers of any defence existing against either of the several

owners. For, although the proceeding assumes the form of a joint suit, it is in reality a mere joinder of distinct causes of action by distinct parties, arising out of a common injury, and which are heard and determined, so far as the merits are concerned, the same as in the case of separate libels for each cause of action. The same decree, also, is entered as in the case of separate suits.

We do not perceive, therefore, any ground for a distinction as to the right of appeal from a decree as entered in these cases from that which exists where the proceedings have been distinct and separate throughout. Clearly, a libellant could not have appeal, unless his claim exceed \$2,000. Nor can the respondent, upon the same principle, unless the amount decreed against him in the particular case, exceeds that sum. The principle, in effect, we think, has been already decided in this court. 6 Pet. 143; 8 *ibid.* 11; 11 How. 522.

There is another preliminary question which it is necessary to notice before proceeding to the merits.

Further evidence has been taken, on the part of the respondents, since the appeal to this court was entered, which is objected to by the appellants.

The act of 3d March, 1803, 2 Stats. at Large, 244, allows additional evidence to be furnished by either party before this court in cases of appeals in admiralty and prize causes. And by the 27th rule of the court the evidence is to be taken under a commission "to be issued from this court, or from the circuit [* 354] court, under the direction of any one of the judges thereof.

The objection taken to the evidence is, that it does not appear from the record that any order was obtained from either court for the issuing of the commission. We have, however, before us the commission itself, issued in the usual form by the clerk of the circuit court, and in the execution of which both parties have joined. An order, therefore, must have been entered, or, if not, it was waived by the act of the parties in suing out the commission, and joining in its execution. For these reasons we think the further evidence furnished to this court admissible.

This brings us to the merits of the case.

The different libels filed in the several cases are in form and substance the same. And so are the several answers of the respondents.

The libels charge that the ship *Martha* being at Liverpool on the 6th September, 1847, and bound on a voyage to Charleston, the libellants caused to be shipped on board the same, divers goods, wares, and merchandise, then in good order and condition, of great value, &c., to be taken care of and safely delivered in like good order and condition, (the dangers and accidents of the seas and navigation

excepted,) they paying certain freight therefor as per bills of lading. That afterwards, on or about the 21st of the same month, the said ship, having on board the said goods, set sail from Liverpool, and on the 9th November following, arrived at Charleston, and soon thereafter delivered the same to the said libellants.

That the said goods, wares, and merchandise were not taken care of and safely carried and delivered according to the tenor and effect of the bills of lading; but, on the contrary, although no damage accrued from any dangers or accidents of the seas, or navigation, the said goods were so badly taken care of by the said master, and the cargo of said ship, and particularly a quantity of salt on board thereof was stowed so improperly, that through the neglect and mismanagement of the master, the said goods were greatly damaged, and great loss thereby sustained.

The answers of the respondents admit the taking on board of the vessel the goods as stated in the libels; and allege, that she was loaded with an assorted cargo in the hold and with sundry sacks of Liverpool salt between decks; that the ship was sound, stanch, and in every way well fitted and equipped for the voyage, and capable of carrying safely the cargo taken on board, the dangers of the seas only excepted. That the cargo was well and securely stowed and packed with proper dunnage, and according to the usage and custom of the trade, by the master and officers of the ship; that [*355] the hatches leading from the between-decks * and the lower hold were well secured and calked, wholly separating the one from the other. That the ship encountered several violent gales, and very boisterous weather during her voyage, causing her to labor heavily, and straining her badly, the sea at times breaking over her, so that she shipped a great deal of water from leaks, and stress of weather, requiring the constant use of the pumps, which were faithfully attended to, and every effort made to preserve the ship, and save the cargo from damage.

The respondents further allege that in consequence of the heavy seas, and the leaking of the vessel, and the change of latitude from a cold to a warm climate, the water shipped became heated, producing steam, and a wet and damp atmosphere in the lower hold, which no care or diligence, on the part of the master and crew could have prevented; that this was the unavoidable result of the dangers of navigation, and proceeded from the storms, winds, and waves; and not from any defect in the ship, or want of skill, care, or diligence on the part of the master and hands, and caused the damage to the goods complained of.

They further say, that the salt stowed between decks was safely

carried, and delivered dry and in good order at Charleston, without being wet, or any evidence of drainage from the same either upon the sacks, the dunnage, and matting upon which the sacks were stowed, or upon the lower deck, through the seams of which the drainage must have passed to the goods in the hold, if at all; and they deny that the damage to the goods in the hold proceeded from the salt thus stowed between decks.

The proofs in the case show, that a mixed cargo, consisting of crates, and boxes of dry goods, and hardware, and a quantity of bars of railroad iron, was stowed in the hold of the vessel, the railroad iron placed at the bottom. And, that some twelve hundred sacks of salt were stowed between decks fore and aft the main hatch of the lower deck. That she left Liverpool on the 21st of September, 1847, and arrived at Charleston on the 9th of November following, after a passage of forty-nine days; that during the voyage she encountered on the first and second of October, two very violent gales, the vessel on the wind at the time, causing her to roll heavily, and the sea to break continually over her, and to ship great quantities of water, so that it was necessary to keep the pumps going most of the time while the storm continued.

On opening the upper hatches a day or two after the arrival of the vessel, for the purpose of discharging the cargo, the salt between decks was found dry and in good condition; and, after the discharge of the same, no unusual wet or dampness appeared upon the matting or dunnage upon which it was stowed, nor *upon [* 356] the flooring of the deck, nor any evidence of drainage from the sacks of salt in any part of the between-decks. All the witnesses concur on this point, who had the best opportunity of becoming acquainted with the facts; and whose connection with the discharge of the salt precludes the possibility of mistake, including the portwarden present at the opening of the hatches, the purchasers of the salt, the consignee, the stevedores, the inspector of the customs, and the mate of the vessel. Nor is there any evidence in the case to the contrary.

On opening the hatches of the lower deck, leading to the hold of the ship, which was about the 15th November, five or six days after her arrival, great heat issued immediately therefrom, and much dampness and vapor were found to pervade this part of the vessel; and on breaking the cargo and commencing the discharge, the greater portion of it was found seriously damaged.

The boxes of dry goods were found wet, or damp, and stained to a very considerable extent, and the hardware, and bars of railroad iron, wet and badly rusted; and indeed, the whole cargo throughout

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the hold more or less damaged. Drops of water, or vapor, apparently formed from the heat and dampness of the hold, or by drainage from above, were found pendant from the seams of the under part of the lower deck, affording very satisfactory evidence of the immediate cause of damage to the cargo; but, leaving the question open to controversy as to the source whence these indications proceeded; some of the witnesses, and among them three of the port-wardens, testifying that these drops proceeded from the drainage of the salt that had been stowed between decks, and others, from the heat and dampness of the hold, aggravated by the quantity of sea-water shipped during the storm, and stress of the vessel.

We have already stated, that the libellants charge in the several libels the damage to the goods to have been occasioned exclusively from the improper stowage of the cargo, and especially of the sacks of salt in the between-decks over the goods in the hold of the vessel. This is denied in the answers, and as the recovery must be had, if at all, according to the allegations in the pleadings, it is incumbent on the part of the libellants to maintain this ground by the proofs, in order to charge the respondents.

The real questions in the case, therefore, are, 1. Whether or not the respondents were guilty of neglect, and mismanagement in the stowage of the cargo, and especially of the stowage of the sacks of salt between decks? And, 2. If they were, whether the damage to the goods in the hold of the vessel was properly attributable to this cause?

The goods having been found to be damaged on the ar-
[* 357] rival * of the ship, and which must necessarily have accrued in the course of the voyage, the burden devolved upon the respondents to show, in order to excuse themselves, that it was occasioned by one of the perils of navigation within the exception in the bill of lading. That burden they have assumed; and have shown by nearly an unbroken current of testimony, that the conveyance of the salt between decks, in a mixed cargo, was according to the established custom and usage of the trade between Liverpool and this country; and that it was well stowed, and packed, and secured with proper and sufficient dunnage.

This ground, therefore, for charging the respondents with the damage to the goods, entirely fails.

They have shown further, that the vessel encountered severe gales and boisterous weather in the course of her voyage, during which she labored heavily, the sea frequently breaking over her, and much water shipped by stress of weather, so that it was necessary to keep the pumps in constant operation to preserve the vessel, and protect

the cargo. Thus presenting a state of facts, in connection with the condition of the hold, and appearance of the goods on the opening of the hatches, when the vessel arrived at her port of destination, that might well account for all the damage by reason of the perils of the navigation.

It is to be observed, also, that even assuming, according to the theory of the libellants, the damage was occasioned by the drainage of the salt coming in contact with sea-water, if the water was shipped from the violence of the storm, or stress of weather, as there was no fault chargeable to the master as to the place of stowage or as to the stowage itself, it is apparent, that even in that aspect of the case, the damage would still be attributable to the perils of the seas, and not to the fault of the master or ship.

In order to avoid these necessary conclusions, the learned counsel for the libellants have sought to maintain upon the proofs, that the seams of the lower deck were not properly calked, but were open, so that the drain from the salt readily dripped through upon the cargo in the hold, and that, conceding it to have been properly stowed between decks, if the seams of the deck had been tight, the damage would not have happened.

Assuming the facts to be true, as contended for in this proposition, the conclusion is admitted. But if the opening of the seams was occasioned by the straining of the vessel in the storms encountered during the voyage, and in favor of which view there is much evidence in the court below, the respondents would still not be answerable. The further proof taken on this appeal would seem to remove all doubt on this point that may have previously existed.

* That shows the ship, when about to sail from Liver- [* 358] pool, was inspected by a competent ship-builder, and repaired; and among other repairs, her lower deck was well calked and payed where any defects were discovered, and put in good order. The fact, therefore, that the seams were open on the arrival of the vessel, if admitted, must have happened in the course of the voyage, and may be fairly attributable to the storms she encountered.

But, it is not important to pursue this inquiry. For, the proofs in the case show beyond all reasonable doubt, that the damage could not have been occasioned by any drainage from the sacks of salt between decks. We have already referred to the witnesses on this point, and need not repeat the evidence.

The salt was taken from the stores at Liverpool, and not from lighters, and was dry when put on board, and also, when discharged at Charleston; and there was not the slightest indication of unusual wetness or dampness upon the sacks or the matting and dunnage

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upon which it was stowed, or upon the flooring or any part of the between-decks. On this branch of the case there is no contrariety or discrepancy in the evidence.

And all the witnesses concur who speak on the subject, and common observation confirms their conclusion, that, if the water came from drainage of the salt, so as to occasion the damage to the goods, some traces of its effects would have been found upon the sacks, and upon the mats and dunnage and deck of the vessel.

The only ground urged for a contrary conclusion is an inference drawn from the fact that drops of water of a brackish taste, indicating, as supposed, the presence of salt in a degree, beyond that of sea-water, was found along the seams on the underside of the lower deck; and of salt in the concrete found upon parts of the cargo in the hold. From these circumstances alone, three of the port-wardens out of four, expressed the opinion that the damage must have been occasioned by the drainage of the salt above, notwithstanding the decisive facts as to the condition of the salt when put on board, and when discharged, and the absence of any traces of it in the between-decks.

It would be exceedingly difficult, if not impossible, to reconcile this opinion with the facts of the case, even if there was no other way to account for the circumstances stated, on which the opinion of the port-wardens was founded.

But when all of them may be accounted for as the natural, if not necessary effect, of the presence of the quantity of sea-water shipped by stress of weather in the course of the voyage, wetting the cargo as the vessel rolled and labored during the storms she encountered, producing great heat and dampness in the hold, we think the opinion altogether unsupported by the evidence.

[* 359] * As to the appearance of salt in the concrete upon parts of the goods, it is quite probable that the water in the hold thrown up the sides by the labor of the vessel in the gales may have brought it in contact with the salt between her timbers, and thus leaving traces of it upon the goods.

Most of the vessels that have been built for many years, particularly eastern vessels, are filled with salt between their side timbers and outside and inside plank or ceiling, up to the air-streak, for the purpose of preserving the timbers, and preventing them and the planks from shrinking. When water comes in contact with this salt, either through the small openings below or air-streak above, or otherwise, the tendency of it is to settle down in the space it occupies, by becoming more compact; and when the ship makes water in the hold, and rolls heavily by stress of weather, throwing the water up

the sides, portions of the salt may escape from the small openings below and pass off along the water-way each side of the keelson to the well-pump. This, however, as is apparent, can happen rarely, if at all except when the ship labors heavily after having shipped much water in consequence of rough and boisterous weather. The effect of the salt, from its inherent tendency to attract and absorb moisture, is to tighten the seams of the ceiling, rather than open them, and thus prevent any escape of the particles of salt through them.

It has been suggested that, assuming the presence of salt in the hold may be properly accounted for in the way above stated, this should be considered as evidence of fault in the ship, so as to charge the respondents.

But in the first place, to permit the libellants to recover upon this ground would be a departure from that upon which they have chosen to place their right of action in the pleadings. That is founded exclusively upon their improper stowage of the salt between decks; and the proofs in the case, have been taken with reference to the issue upon that allegation.

In the next place, there is no evidence before us of any defect or fault in the vessel in respect to the ceiling or other parts of her connected with the process of thus salting the timbers. On the contrary, the port-wardens, themselves, speak of the seams of the ceiling as being tight and in good order.

The truth is, that all the cases proceeded below, on the part of the libellants throughout, upon the allegation in the libels that the damage was occasioned by drainage from the sacks of salt between decks, where as supposed, it was improperly stowed. And the evidence in the record in respect to the condition of the ceilings and other parts of the hold of the vessel, was mere incidental and casual, no point having been made in the proofs on that subject.

* We have already expressed our views upon this the [* 360] main question involved in the case, and are satisfied, that the damage could not have been occasioned for the cause set forth in the libels; but happened from the perils of the navigation. We will simply add, what was omitted in the proper place, that nearly all the witnesses concur who speak on the subject, that the goods in the hold were most damaged by wet and dampness at the bottom, or lower tier, and diminishing in the advance to the upper. And that in many instances, the boxes of goods, and crates of hardware were wet, or very damp, and stained at the bottom, and dry and sound on the top and sides, confirming the view that the damage proceeded from below.

Our conclusion is, that the decree of the court below is erroneous,

United States v. Reid. 12 H.

and must be reversed with costs, as to so much as awards damages to T. Lambert and Brother, and to the South Carolina Railroad Company, and that the proceedings be remitted to the court below with directions to enter a decree in favor of the appellants with costs; and as to the residue of the decree the appeal is dismissed for want of jurisdiction.

DANIEL, J., dissented.

This case is one of a class over which, according to my opinion, heretofore repeatedly expressed, the admiralty courts of the United States have no jurisdiction under the constitution. It is the case of a contract entered into upon land, that is, in the city of Liverpool, to be fulfilled, partly, nay chiefly, on land; that is, by the delivery of merchandise in the city of Charleston. The remedy for the infraction of this undertaking, if any had in reality existed, would have been an action in a court of common law, upon the bill of lading, the written evidence of the undertaking of the carrier. In the exposition made by the court, of the evidence, as explaining the origin and character of the injury complained of by the libellants, I entirely concur.

17 H. 8; 21 H. 7; 28 H. 491; 1 B. 156; 5 Wal. 208.

THE UNITED STATES, Plaintiffs, v. THOMAS REID and EDWARD CLEMENTS.

12 H. 361.

The 34th section of the judiciary act of 1789, (1 Stats. at Large, 92,) applies only to the trial of civil actions at the common law.

In criminal trials in the courts of the United States held in one of the original thirteen States, the admissibility of evidence depends upon the law of the State where the trial is held, as it was, when the courts of the United States were established by the judiciary act of 1789.

Though no absolute rule is laid down, concerning the exclusion of the testimony of jurors as to misconduct in the jury-room, the court examined the evidence in this case, and held it did not show ground for a new trial.

THE case is stated in the opinion of the court.

Joynes, (district-attorney,) and *Crittenden*, (attorney-general,) for the United States.

Crane and *Scott*, contra.

TANEY, C. J., delivered the opinion of the court.

This case comes before the court upon a certificate of divis-

ion between the judges of the circuit court for the district of Virginia.

Thomas Reid and Edward Clements were jointly indicted for murder, committed by them on the high seas, on board the American ship J. B. Lindsey.

They were, by the permission of the court, separately tried, and upon the trial of Reid, he proposed to call Clements as a witness on his behalf. The court rejected the testimony, being of opinion that, as he was jointly indicted with the prisoner on the trial, he was not a competent witness. Reid was found guilty by the jury.

At a subsequent day he moved for a new trial upon two grounds. 1. Because the testimony of Clements was improperly rejected; and, 2. For misbehavior in two of the jury who tried the cause. In support of the second objection, he offered in evidence the voluntary affidavits of the two jurors, one of *whom [*362] deposed "that, while the case was on trial, and the jury were impanelled, a newspaper was sent to him by some of his family from his counting-room. It was a newspaper for which he was a subscriber, which was regularly left at his counting-house, and which he was accustomed to read. He looked slightly over it, and saw that it contained a report of the evidence which had been given in the case under trial, a part of which he read and put the paper in his pocket; that, while the jury were in their room deliberating on their verdict, he read over the report of the evidence in the newspaper; he read it from curiosity, and thought it correct, and that it refreshed his memory; but it had no influence on his verdict, and that he had made up his mind before he read it. There was no conversation about the newspaper report in the jury-room, nor did he speak of it there to any one, nor does he know that the other jurors knew that the report of the evidence was in the newspaper they saw him reading."

The other juror deposed "that he saw this newspaper while the jury was impanelled in the court-room, and, upon looking at it, saw that it contained a report of the evidence that had been given in the case under trial. He looked over a few sentences and put the paper aside, and did not see it afterwards. He did not think the report accurate; it had not the slightest influence on his judgment."

Upon the argument of the motion above mentioned the following questions arose:—

1. Ought the court to have received the evidence of Clements in behalf of the prisoner; and does the refusal of the court to admit his testimony entitle the prisoner to a new trial?

2. Ought the affidavits of the two jurors to be received; and do the facts stated in them entitle the prisoner to a new trial?

And upon each of these points the judges of the circuit court were opposed in opinion, and ordered that the questions be certified to the supreme court for its decision.

The difficulty in the first question arose upon the construction of the 34th section of the act of congress of 1789.

By a statute of Virginia, adopted in 1849, it is provided "that no person who is not jointly tried with the defendant shall be incompetent to testify in any prosecution by reason of interest in the subject-matter thereof." And if the section in the judiciary act above referred to extends to the testimony in criminal cases in the courts of the United States, then the testimony of Clements was improperly rejected.

The section in question declares that the laws of the [*363] several States, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply.

The language of this section cannot, upon any fair construction, be extended beyond civil cases at common law, as contradistinguished from suits in equity. So far as concerns rights of property, it is the only rule that could be adopted by the courts of the United States, and the only one that congress had the power to establish. And the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the States. But it could not be supposed, without very plain words to show it, that congress intended to give to the States the power of prescribing the rules of evidence in trials for offences against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of congress, and that the statute of Virginia was not the law by which the admissibility of Clements as a witness ought to have been decided.

Neither could the court look altogether to the rules of the English common law, as it existed at the time of the settlement of this country, for reasons that will presently be stated. Nor is there any act of congress prescribing in express words the rule by which the courts of the United States are to be governed, in the admission of testimony in criminal cases. But we think it may be found with sufficient certainty, not indeed in direct terms, but by necessary

implication, in the acts of 1789 and 1790,¹ establishing the courts of the United States, and providing for the punishment of certain offences. And the law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the State, as it was when the courts of the United States were established by the judiciary act of 1789. The subject is a grave one, and it is therefore proper that the court should state fully the grounds of its decision.

The colonists who established the English colonies in this country, undoubtedly brought with them the common and statute laws of England, as they stood at the time of their emigration, so far as they were applicable to the situation and local circumstances of the colony. And among the most cherished and familiar principles of the common law was the trial by jury in civil, and still more especially in criminal cases. And however the colonies may have varied in other respects in the modifications with which the common or statute law was adopted, * the trial by jury in all [* 364] of them of English origin was regarded as a right of inestimable value, and the best and only security for life, liberty, and property.

But as the law formerly stood, the value of this right was much impaired by the mode of proceeding in criminal cases. For when a person was accused of a capital crime, and his life depended upon the issue of the trial, he was denied compulsory process for his witnesses; and when they voluntarily appeared in his behalf, he was not permitted to examine them on oath, nor to have the aid of counsel in his defence, except only as regarded the questions of law.

It is true that Lord Coke, in his 3 Inst. part 3, 79, declares in strong terms that the rule which prohibited the witnesses for the accused from being examined on oath, was not founded in law. Yet the rule, at the period we speak of, was daily sanctioned and acted on in the English courts. 2 H. Pl. of the Crown, 283, 4 Bl. Com. 355, 358, 359, and was in full force when the English colonies were planted in this country.

This oppressive mode of proceeding had been abolished in England and the colonies also by different statutes before the declaration of independence. But the memory of the abuses which had been practised under it had not passed away. And the thirteen colonies who united in the declaration of independence, as soon as they became States, placed in their respective constitutions or fundamental laws, safeguards against the restoration of proceedings which were so oppressive and odious while they remained in force. It was the

¹ 1 Stats. at Large, 112.

people of these thirteen States which formed the constitution of the United States, and ingrafted on it the provision which secures the trial by jury, and abolishes the old common-law proceeding which had so often been used for the purposes of oppression. And the provisions in the constitution of the United States in this respect are substantially the same with those which had been previously adopted in the several States. They were overlooked in the constitution of the United States as originally framed. But as soon as the public attention was called to the fact, that the securities for a fair and impartial trial by jury in criminal cases had not been inserted among the cardinal principles of the new government, they hastened to amend it, and to secure to a party accused of an offence against the United States, the same mode of trial, and the same mode of proceeding, that had been previously established and practised in the courts of the several States.

It was for this purpose that the 5th and 6th amendments were added to the constitution. The 6th amendment provides that, in all criminal prosecutions, the party accused shall be entitled [* 365] *to a trial by jury, to be confronted with the witnesses against him, to have compulsory process for the witnesses in his favor, and to have the aid of counsel in his defence.

The judiciary act of 1789, section 20, provides for the manner of summoning jurors, and directs that in all cases (of course including criminal as well as civil cases) they shall be designated by lot or otherwise in each State, according to the mode of forming juries therein as then practised, so far as the law of the State shall render such designation practicable by the courts or marshals of the United States; and that the jurors shall have the same qualifications as were requisite for jurors by the law of the State of which they are citizens, in the highest court of law in the State. Both of these provisions are confined by plain language to the state laws as they then were.

The crimes act, as it is usually called, of 1790, section 29, makes some further regulations, which it is not necessary here to specify, in relation to the proceedings and right of peremptory challenge in criminal cases before the jury are impanelled.

But neither of these acts make any express provision concerning the mode of conducting the trial after the jury are sworn. They do not prescribe any rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined. Yet, as the courts of the United States were then organized, and clothed with jurisdiction in criminal cases, it is obvious that some certain and established rule upon this subject was necessary to enable the courts to administer the criminal jurisprudence of the United

States. And it is equally obvious that it must have been the intention of congress to refer them to some known and established rule, which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous. This is necessarily to be implied from what these acts of congress omit, as well as from what they contain.

But this could not be the common law as it existed at the time of the emigration of the colonists, for the constitution had carefully abrogated one of its most important provisions in relation to testimony which the accused might offer. It could not be the rule which at that time prevailed in England, for England was then a foreign country, and her laws foreign laws. And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of congress, was that which was then in force in the respective States, and which they were accustomed to see in daily and familiar practice in the state courts. And this view of the subject is confirmed by the provisions in the act of 1789, which refers its courts and officers to the laws of the respective States *for the qualifications of jurors and the mode of selecting [* 366] them. And as the courts of the United States were in these respects to be governed by the laws of the several States, it would seem necessarily to follow that the same principles were to prevail throughout the trial; and that they were to be governed in like manner, in the ulterior proceedings after the jury was sworn, where there was no law of congress to the contrary.

The courts of the United States have uniformly acted upon this construction of these acts of congress, and it has thus been sanctioned by a practice of sixty years. They refer, undoubtedly, to English works and English decisions. For the law of evidence in this country, like our other laws, being founded upon the ancient common law of England, the decisions of its courts show what is our own law upon the subject where it has not been changed by statute or usage. But the rules of evidence in criminal cases, are the rules which were in force in the respective States when the judiciary act of 1789 was passed. Congress may certainly change it whenever they think proper, within the limits prescribed by the constitution. But no law of a State made since 1789, can affect the mode of proceeding or the rules of evidence in criminal cases; and the testimony of Clements was therefore properly rejected, and furnishes no ground for a new trial.

The first branch of the second point presents the question, whether the affidavits of jurors impeaching their verdict ought to be received.

It would perhaps hardly be safe to lay down any general rule upon

this subject. Unquestionably, such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice. It is, however, unnecessary to lay down any rule in this case, or examine the decisions referred to in the argument. Because we are of opinion that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial. There was nothing in the newspapers calculated to influence their decision, and both of them swear that these papers had not the slightest influence on their verdict.

We shall therefore answer the first question in the negative; and to the second, that the facts stated in the affidavits of the jurors do not entitle the prisoner to a new trial; and certify accordingly to the circuit court.

7 Wal. 580.

JOHN H. BENNETT and E. P. HUNT, Administrators of JOHN D. AMIS deceased, Appellants, v. SAMUEL F. BUTTERWORTH, and MARY EMILY, his Wife.

12 H. 367.

A mortgagee, in possession of slaves, is accountable, not only for their hire actually received by him, but for what he might have received without gross negligence.

THE case is stated in the opinion of the court.

Harris and Crittenden, (attorney-general,) for the appellants.

Howard, contra.

M^CLEAN, J., delivered the opinion of the court.

This is an appeal in chancery from the decree of the district court for the district of Texas.

Butterworth and wife filed their bill against Bennett, and also against Hunt, who is administrator of Amis, representing that Amis, the father of Mrs. Butterworth, conveyed to her by deed, or bill of sale under seal, in consideration of natural love and affection, certain negroes named, on the 8th of April, 1846. That, a short [* 368] time afterward, Amis died, and that Hunt, the * defendant, administered upon his estate. That, on application to the administrator for the slaves, it was found they were in possession of Bennett, the other defendant, who claimed to hold them by an absolute bill of sale, executed in June, 1845, by the said Amis, and that the slaves were, and had been, from the date of the bill of sale or shortly afterward, in the possession and under the control of Bennett, who received the profits of their hire. That the negroes were trans-

ferred to him to secure an indebtedment, and also to secure future advances. The negroes were demanded of Bennett, but he refused to surrender them, on the ground that his debt had not been paid.

In his answer, the defendant, Bennett, says, the negroes were in his possession at the death of Amis; that he is unwilling to surrender the possession of them until his claim shall be fully satisfied; he denies that the proceeds of the labor of the slaves were sufficient to discharge his debt, &c.

The defendant, Hunt, in his answer, states that, on the 1st April, 1846, in the lifetime of Amis, matters of difference between him and Butterworth were submitted to the arbitrament of James H. Smith and W. W. Humphries, who awarded that Butterworth should deliver to John D. Amis two negro men named, or pay \$2,500; that other negroes should be delivered and certain moneys paid by Butterworth, and that he should do certain other things, &c.; and that Amis, on his part, should transfer all the interest he might have to any portion of the estate formerly owned by him, to Mary E. Butterworth, wife of the complainant. And he alleges that Butterworth did not comply with the award on his part; and the defendant asks that he may be compelled to perform it; and that the bill of sale by Amis to Mrs. Butterworth, of the negroes, was given in pursuance of this award.

It appears that John D. Amis and William D. Amis, on the 15th of December, 1839, by an indenture, conveyed to Andrew Harris and others, their creditors, to whom they owed debts amounting to \$73,269.88, a large amount of real and personal property, to secure the payment of that sum. A large number of negroes were included in this transfer.

Bennett also pleaded in bar the recovery of a judgment by Butterworth against defendant in the district court, for the negroes named in the amended bill, or, if the same could not be had, it was adjudged that he should recover \$1,200, the value of the negroes.

The court made an interlocutory decree, that the bill of sale was a mortgage, and that the complainants had a right to redeem, &c.; and James Love was appointed to take an account of the amount due Bennett on the mortgage, and also to take an account [* 369] of the hire of the negro slaves in the possession and under the control of Bennett; and the master was directed to credit him with any extraordinary expenditures which were necessary on account of the health of the negroes, and also for rearing the children, &c., and that the master should report, &c.

A report was made by the master, as directed, which showed that the mortgage money and interest had been paid by the hire of the

negroes, &c., and that a balance was due to the complainant of \$318.90.

Exceptions were taken to this report, which were overruled by the court, and a decree was entered confirming the report, and ordering the sum found due to the complainants to be paid, and that the negroes in controversy, in the hands of a receiver, should be delivered to the complainants.

On this appeal, the rulings of the court, on the exceptions taken, are the points to be considered.

The first exception is that, in his report, the master states: —

“The defendant has filed and proved an account marked No. 1, of the receipts and expenditures under the mode of management in said report stated, which he did not investigate,” as he assumed a different mode of management to have been necessary to exempt the defendant, by the terms of the decree, from “wilful default.”

In his report, the master says: “It appears in evidence that Bennett treated the slaves with unusual indulgence and humanity, and in the manner that was pursued by Amis in his lifetime. He rented houses for them, furnished them food and clothing with great liberality, and proper medical attendance when necessary. That he sometimes hired them by the day, and sometimes by the month. It is also in proof, that the negroes frequently hired themselves to others, and were paid by their employers.”

The defendant having possession of the slaves, and an entire control over them, was bound to exercise a reasonable diligence in keeping them engaged in useful employments, so as not only to pay their necessary expenses, but also to obtain a reasonable compensation for their labor. That he treated them with humanity, provided for their wants, and made them comfortable, is not sufficient. Nor is it a sufficient excuse for him to say that he managed the slaves as they had been managed by Amis, their master. Bennett held them as a pledge, and he was not at liberty to indulge them in idleness, as their master may have done. In his peculiar relation, as trustee, he had active duties to perform; and we think the master did right in rejecting the account rendered, under a management which [* 370] showed, * on his part, gross negligence, or in the language of the interlocutory decree, “wilful default.”

It appears that Amis died on the 1st of August, 1847, at which time the slaves were in the possession of Bennett, and continued to be in his possession at the time the account was taken. Three months were allowed by the master, after the death of Amis, before the account commences; and as there was considerable sickness at Galveston, where the slaves were situated, “he allowed one hundred

dollars as extraordinary expenditures for medical attendance, food, house-rent, and nursing." And he says he allowed nothing for medicine or medical bills, except during the prevalence of the yellow fever, because the allowance for hire was made on a basis which covered all deductions for loss of time or other contingencies.

The second exception is, that the master in an account, No. 2, filed by him, stated the charge for hire of the slaves as commencing on the 1st of November, 1847, when he was restricted from making such charge prior to the 20th of March, 1849.

No such restriction is perceived in the answer of Bennett, nor in any other part of the proceeding. It seems that Bennett was in possession of the slaves before the death of Amis, and as is alleged in the answer, at least a part of the hire was paid to Amis during his life. But the account for the hire is made to commence three months after his death, at which time it is admitted the estate of Amis was indebted to Bennett \$1,433.72.

The third and last exception to the report is, "that the master, in account No. 2, filed, states a balance due complainants on the 1st of June, 1850, of \$318.90, which is contrary to the evidence of complainants and defendant now filed with said report marked No. 3 and No. 4; and hath not, in his said report, allowed and credited the defendant the expenses proved to have been incurred in the management of the slaves.

As this exception refers to the evidence before the master, we have examined it, and although there is a discrepancy between some of the witnesses as to the hire of the slaves, yet the weight of evidence seems to be in favor of the report of the master. He made no special allowance for expenses, medical or otherwise, as he stated the allowance for the service of the slaves, at a sum which such services were proved to be worth, clear of all deductions for clothing, loss of time, or medical treatment.

It is probable that the sum allowed by the master exceeded, considerably, the actual money received for the hire of the slaves. But the negligence or want of attention by Bennett, in giving indulgence to the slaves, or in failing to have them suitably employed, should not excuse him from an equitable charge of "what [* 371] they could have earned. On this basis the master acted in making out the account, and we think it was properly assumed by him. And in this view there appears to be no error or mistake in the account stated, which should have prevented the district court from sanctioning it.

The charges by Bennett for the superintendence and management of the slaves, were not allowed by the master, nor the charge for

commissions. These items, if the defendant were entitled to an equitable allowance for the services stated, would amount only to a small sum, and we think, under all the circumstances of the case, neither this omission, nor the other exceptions to the report of the master, are of a character to require the reversal of this decree.

There was no action on the plea in bar filed by Bennett, which is an irregularity, not important, however, to be noticed on the appeal. Nor does it appear that any notice was taken in the district court of the award set up in his answer by Hunt, the administrator. As the consideration for the transfer of the slaves by Amis to his daughter was natural love and affection, as appears by the bill of sale, it could not have been considered as within the award stated.

The decree of the district court is affirmed, with costs.

PHINEAS O., NABBY, JABEZ, and BENJAMIN B. SARGEANT, Heirs of
SAMUEL SARGEANT, Plaintiffs in Error, v. THE STATE BANK OF
INDIANA.

12 H. 371.

Certain special acts of the State of Indiana, as to lands given for the establishment of a county seat, examined and applied.

A paper found on the files of the court in a case, purporting to show how notice was given in that case, but contradicting the entry on the record that due notice was given, is not a part of the record, nor entitled to any effect.

ERROR to the circuit court of the United States for the district of Indiana. The case is stated in the opinion of the court.

Smith, for the plaintiffs.

White, contra.

[* 378] * DANIEL, J., delivered the opinion of the court.

The facts upon which this case is founded are to the effect following. The legislature of Indiana, having by a law bearing date on the 20th of January, 1826, laid off and established the county of Tippecanoe in that State; by the same act appointed four commissioners for the purpose of selecting and establishing a seat of justice for the county thus created, in conformity with the provisions of another statute of the State, passed on the 14th of January, 1824, entitled "An act establishing seats of justice in new counties," and with the provisions of other acts amendatory of the law last mentioned. Pending the investigation of the commissioners who took upon themselves the fulfilment of the duties prescribed by the statutes above mentioned, proffers were made to them by various

persons, proprietors of land in and adjacent to the town of Lafayette, of certain lots and parcels of land as donations to the county of Tippecanoe, and amongst these proffers was that of the land involved in this suit, then held by Samuel Sargeant, from whom the lessors of the plaintiffs deduce their title. The commissioners having accepted the donations offered as above mentioned, and selected the town of Lafayette as the seat of justice for the county of Tippecanoe, took from the several donors their joint and several title-bond, dated May 4, 1826, in the penalty of \$10,000, payable to the board of justices of the county to be thereafter organized, with condition that these obligors should convey by deed with general warranty to the board of justices, on the 1st day of October, 1826, the lots and parcels of land contained in their respective donations within the town of Lafayette, and took also the separate bond of Samuel Sargeant, conditioned to convey at the same period, by a like deed to the board of justices, another parcel of land of ten acres, adjoining the town, as in the conditions annexed to those bonds set forth. The board of justices appointed by the governor of Indiana for the county of Tippecanoe, was organized on the 8th day of July, 1826, and on that day received the report of the commissioners appointed by law to select the seat of justice for the county of Tippecanoe, and at the same time received and accepted the joint and several obligation of Samuel Sargeant and others above mentioned; and also the separate bond of Samuel Sargeant, conditioned for the execution of a deed with general warranty to the board of justices for the tract of ten acres of land as before referred to, the said Samuel Sargeant having been chosen their clerk by the board of justices, entered upon the record their acceptance of the title-bonds given by himself and others in his own handwriting. Samuel Sargeant having died before the execution of any deed either by the obligors in the joint and several bond, * or by Sargeant alone, in pursuance of his [* 379] separate obligation, proceedings were instituted at the November term, 1827, of the circuit court of the county of Tippecanoe for the appointment of a commissioner, for the purpose of conveying to the board of justices the title and interest held by Samuel Sargeant in his lifetime in the lots and parcels of land mentioned in the joint and several bond of Sargeant and others, and in the ten acres of land mentioned in the separate title-bond executed by Sargeant. The circuit court appointed Richard Johnson a commissioner, in conformity with the application, and this commissioner, conjointly with all the obligors except Sargeant, executed to the board of justices a deed with general warranty for the lands mentioned in the joint and several bond, and a separate deed for the ten acres of land described

in the bond given by Sargeant individually. The proceedings of the circuit court of Tippecanoe, upon the petition of the board of justices, and the conveyances ordered by that court, took place in the years 1826 and 1827, and are of record.

In the year 1846, the lessors of the plaintiffs, representing themselves to be heirs at law of Samuel Sargeant, instituted this their action of ejectment against the State Bank of Indiana, as the tenant in possession of lots No. 90 and 132, situated in the town of Lafayette. The said defendant also deducing title mediately from Samuel Sargeant, by purchase from the board of justices for the county of Tippecanoe, no question, therefore, is raised upon the validity of the title as originally existing in Samuel Sargeant.

At the trial, the lessors of the plaintiffs having introduced evidence to show the death of Samuel Sargeant on the 31st of July, 1826, and that the said lessors were his heirs at law, and evidence also of the value of the property in dispute, there rested their cause.

The defendant then offered in evidence the report of the commissioners appointed under the act of the legislature of January 20, 1826, to locate the seat of justice for the county of Tippecanoe; the record of the appointment and qualification of the board of justices for the said county in July, 1826; the delivery to them and their acceptance of the title-bonds from the locating commissioners; their petition to the circuit court in order to obtain a conveyance of the lands mentioned in the title-bonds; the record of the proceedings of the circuit court of Tippecanoe upon the petition of the board of justices, and the conveyances to them made in pursuance of the judgment of that court, as comprised in the foregoing statement of facts. Upon the evidence thus submitted, the jury found a verdict for the defendant.

[* 380] * The questions presented for our consideration by this record arise upon exceptions to the rulings of the court refusing certain instructions asked by the plaintiffs with regard to the evidence adduced by the defendant, and in charging the jury upon the law applicable to that evidence as expounded by the court. Thus the plaintiffs prayed the court to instruct the jury: 1. That the title-bonds, given in evidence by the defendant, were void as against Samuel Sargeant and his heirs for want of an obligee in existence capable of being contracted with at the time of the delivery of these bonds.

2. That the title-bonds are a nullity as against the said Sargeant and his heirs.

3. That the record and proceedings of the Tippecanoe circuit court and the commissioners' deed in pursuance thereof, are wholly void, and did not divest the title of Samuel Sargeant's heirs.

4. That the certified copy of the notice and proof of publication, given in evidence by the plaintiffs, is a part of the record of the proceedings of the Tippecanoe circuit court, and as such, may explain and qualify the statement in the record, that proof was made that "due and legal notice" had been given.

These several instructions the court refused to give, but charged the jury that the said record of Tippecanoe circuit court was not void, and that the proof produced and given in evidence as aforesaid by the defendant was competent to prove a dedication to public use, and the title of the premises in controversy out of the lessors of the plaintiffs. It was agreed by the parties in this case that the printed statutes of Indiana, so far as they are applicable to the case, should be deemed and taken as parts of the record in this cause, and be so considered by this court.

In considering the first three charges asked for by the plaintiffs, this court can perceive no essential difference between them, but regards them as resolving themselves into the single objection of the want of an obligee or grantee capable of receiving any legal rights from the acts of Samuel Sargeant; for it follows necessarily that if any legal or equitable rights were invested or transferred by the title-bonds delivered by Sargeant in his lifetime to the commissioners, such rights could not remain in his heirs. The fourth charge required of the court presents quite a different question, and one going rather to the mode or form by which the title to the property has been transferred or ratified, than to the foundation of the right or title itself.

Although, if tested by the rules of law applicable to conveyances of real property, bonds like those executed and delivered by Samuel Sargeant in his lifetime could not confer a legal title, yet if adduced in support of a possession of twenty years, * held [* 381] as in this instance, in pursuance of the express condition of those bonds, they would seem to corroborate such possession against an action founded upon the mere right of entry in the obligor or his heirs.

But these bonds should not be judged of by the strict rules of the common law, not by the general principles applicable to uses and trusts in the conveyance of legal titles, but should be interpreted according to the local policy of the community which called them into existence, and which has defined both their objects and effects. Whatever these bonds were designed to be, whatever purposes they were, by the local policy and laws of Indiana, intended to accomplish in respect to the makers thereof, or the beneficiaries therein named, this court should endeavor to effectuate.

By the general law of Indiana, approved January 14, 1824, en-

titled: "An act to establish the seats of justice in new counties," it is provided in section first, "that whenever any new county shall be laid off, five commissioners shall be appointed, whose duty it shall be to locate the seat of justice in such new county, to receive donations in land, and to take bond or bonds of any person proposing to give any such lands, payable to the board of county commissioners and their successors in office, and conditioned for the conveyance of such tract or tracts of land so given or sold to such person as the county commissioners shall appoint to receive the same, which bond or bonds the said commissioners shall deliver to the county commissioners, together with a plain and correct report of their proceedings, containing a particular description of the lands so selected for the county seat." By section fourth of the same act, it is declared "that the county commissioners, so soon as the report of the locating commissioners is received, shall appoint a county agent, who shall receive deeds for such donated lands, and lay them off into lots," &c. The act of the Indiana legislature creating the county of Tippecanoe, passed January 20, 1826, by section seventh, so far alters the general law of 1824, for the establishment of new counties, as to substitute a board of five justices of the peace, who shall constitute a board for transacting all other county business, as well as the duties theretofore devolving on the board of county commissioners in organizing a new county. This statute was to take effect on the 1st of March, 1826, and, by its second section, the board of commissioners were appointed by name for the purpose of fixing a permanent seat of justice for the county on the first Monday in May, 1826. The election or appointment of the board of justices for the county of Tippecanoe was, by the proclamation of the governor, to take effect not until the day of June following. The grants [*382] *or donations to the locating commissioners having been authorized by law from the first Monday in May, 1826, and the grantees or ultimate beneficiaries, namely, the board of justices, not being chosen on their election authorized until after the day of June, 1826, if the objection alleged to the donations made or received by the locating commissioners, namely, the absence of a competent obligee or grantee, be sustained, then the whole legislation of the State upon this subject, and the obvious purposes of that legislation, must be defeated. Such a result, however, can hardly be reconciled with either the provisions or the purposes of the legislation of Indiana in reference to this subject; for by the general law of that State, approved January 14, 1824, regulating the establishment of new counties, we find it provided that the commissioners appointed to locate the seat of justice in a new county, and to receive the do-

nations and to take the bonds mentioned in that law, are required, together with their report, to deliver said title-bonds to the county commissioners. This delivery, therefore, of the bonds so taken, must have been by this general provision intended to refer to some period after these county commissioners or board of justices had come into existence. We think there can be no question as to the power of the State to create or authorize a contract which should operate in this mode.

The acts of the board of commissioners for selecting the county seat, those of the board of county justices, and of the donors of lands to the county, all conform to this construction. Thus in the case before us, the title-bonds were taken by the former board, were by them subsequently, together with their report, delivered to the board of justices; and Samuel Sargeant, who had previously deposited the title-bonds executed by himself, with the former board, and who had been subsequently appointed the clerk of the county justices, in his character of clerk, certifies the record of these proceedings. We think, therefore, that the circuit court for the district of Indiana properly refused to pronounce the bonds executed by Samuel Sargeant, and the proceedings of the board of commissioners and of the board of justices void, and correctly allowed them to be given to the jury as competent evidence to be weighed by them in expounding the provisions of the statutes of Indiana above referred to.

Should it be conceded that the execution of the title-bonds by Samuel Sargeant in his lifetime, and the proceedings on the part of the board of commissioners and of the board of justices did not, under the statutes of Indiana, confer a legal title on the county, or clearly divest the title of Sargeant; yet, these acts standing alone and unconnected with the proceedings of the circuit court of Tippecanoe, show an equity on the part of the * county [* 383] which clearly authorized them to call for the legal title from Sargeant. They show a written contract formally entered into and solemnly recognized by him, and a fair equivalent or consideration for that contract, in the enhanced value of property arising from the establishment of the seat of justice, forming an obligation from which neither Sargeant nor his heirs could withdraw without the perpetration of a gross fraud.

This brings us to a consideration of the fourth charge asked of the circuit court in the trial below, and of the decision of the court thereupon, involving the regularity of the proceedings at the suit of the county justices in the circuit court of Tippecanoe, in order to perfect their title stipulated for in the bonds executed by Samuel Sargeant.

The court was requested by the proposed charge to say to the jury, that a certified copy of a notice and proof of publication offered in evidence by the plaintiffs, were a part of the record of the proceedings of the Tippecanoe circuit court, and, as such, might explain and qualify the statement of the record itself, that proof was made that "due and legal notices had been given," which charge the court refused to give, but charged the jury that the said record of the Tippecanoe circuit court is not void, and that the above proof, so produced and given in evidence by the said defendant, is competent evidence to show a dedication to public use, and the title of the premises out of the lessors of the plaintiffs.

Of the correctness of the circuit court in refusing this last charge, we entertain no doubt whatever. With a view of determining the propriety of this rejection by the circuit court, it may be proper here to refer to an act of the legislature of the State of Indiana, approved on the 20th of January, 1826, entitled: "An act amendatory of the law for the better advancement of justice," (under which statute the decision of the circuit court of Tippecanoe, impugned by the plaintiffs below, was made.) By the tenth section of this statute, it is provided, "that whenever any person or persons who shall have executed, or hereafter shall execute, his or their obligation for the conveyance of any real estate to any person or persons, body politic or corporate, shall die intestate or without having made the necessary provisions by will for the conveyance of such estate, it shall be lawful for the obligee or obligees in such bonds, or his or their assignees, to apply to the circuit court of the county in which such real estate lies, to appoint a commissioner to convey the same in conformity with the conditions of the said obligation, by a deed to be by such commissioner executed, of the same tenor and effect as the deceased obligor was bound to make in his lifetime; provided the person or persons, making such application as aforesaid, shall first give four [* 384] weeks' personal notice to *the heir or heirs of such obligor or obligors if residents of the State, and if non-residents, then three months' notice of such application, by advertising the same three weeks successively in the nearest public newspaper to which the said real estate is situate—and the commissioner shall," &c., &c.

Under the authority of the section just quoted, application in the name and on behalf of the county of Tippecanoe was made by petition to the judges of the circuit court of that county, for the appointment of a commissioner to convey the lands mentioned in the title-bonds executed by Sargeant, and which he had failed to convey in conformity with those obligations. In setting forth the action of the court upon this petition, the record contains the following statement :

"Came into court Peter Hughes, agent for the county of Tippecanoe by his attorneys, and moves the court now here to appoint a commissioner to convey real estate under and in conformity to a title-bond given by Samuel Sargeant, deceased, and others therein named in his lifetime, to the board of justice of Tippecanoe county and their successors in office, which bond he now here files, for the conveyance of certain town lots in the town of Lafayette in the said bond mentioned and numbered. Also files a bond given by the said Samuel Sargeant deceased, by himself, for the conveyance of ten acres of land east and adjoining the town of Lafayette, to the board of justices of the county and their successors in office, and it appearing to the court now here, that proper and legal notices have been given of this motion, it is by the court now here ordered, that Richard Johnson be appointed commissioner to convey, by good and sufficient deed unto the board of justices of Tippecanoe county and their successors in office, the said lots and parcels of ground, in pursuance of the afore-said bonds in fee-simple, for and on behalf of the heirs of Samuel Sargeant, deceased." It is this record of the decision of the circuit court of Tippecanoe county, and particularly that portion of it which states that the decision was pronounced after proper and legal notices had been given to the heirs of Samuel Sargeant, that the plaintiffs asked of the court to charge was irregular and void, upon the strength of a paper purporting to be a notice which they urged the court to consider as a part of the record of the proceedings of the Tippecanoe circuit court, and as such, explaining and qualifying the statement in that record, that proof was made to the court of due and legal notice to the heirs of Samuel Sargeant.

With respect to the propriety and regularity of this application to the circuit court, we would remark in the first place, that the mere fact of a paper being found amongst the files of a cause, does not of itself constitute it a part of the record of the *cause. [* 385] In order to render it a part of the record it should form some part of the pleadings in the cause, or be brought under and ingrafted upon the action of the court by some motion from the parties. Without this, such a paper can no more be a portion of the record than would the knowledge of facts on the part of a witness, who had been summoned and not examined, or the oral testimony given to a jury and not noted by exception or otherwise. There is nothing in the record of the circuit court of Tippecanoe to show that the paper on which this fourth charge asked for by the plaintiffs is founded, was ever brought to the notice of the court last mentioned. The real veritable record informs us, that legal and sufficient notice was given to the heirs of Samuel Sargeant, but whether by this paper or in

what other mode, except that it was legal and sufficient, we are not told, and are not at liberty in this case to indulge in inferences against the verity of the record. It is a principle well settled, too, in judicial proceedings, that whatever may be the powers of a superior court, in the exercise of regular appellate jurisdiction, to examine the acts of an inferior court, the proceedings of a court of general and competent jurisdiction, cannot be properly impeached and reëxamined collaterally by a distinct tribunal, one not acting in the exercise of appellate power. To permit the converse of this principle in practice, would unsettle nine tenths of the rights and titles in any community, and lead to infinite confusion and wrong. In support of a principle so obvious and of such universal acceptance as is that just above stated, a recurrence to cases would seem to be wholly unnecessary. We will mention, however, one in this court, which, from its direct appositeness to the question now under consideration, may be regarded as conclusive. The case alluded to is that of Grignon's Lessee v. Astor, 2 How. 319. This was an action of ejectment brought by the heirs of a decedent to recover lands which had been sold by the personal representative, who, by the law of Michigan, was, in the event of a deficiency of the personal assets to pay debts, authorized to sell the real estate, upon a license granted him to effect such sale, but to be obtained only upon proofs prescribed by the statute to be made before the court by which the license to the administrator was to be granted. The objection to the title of the purchaser was, that by the record of the court granting the license to the administrator to sell, it was apparent that the prescribed evidences of deficiency of the personal assets had not been adduced, and that the court had therefore exceeded the powers with which it was clothed by the statute. The language of the record is as follows: "The petition of Paul Grignon, administrator on the estate of Pierre Grignon, late of the county of Brown, deceased, [*386] *was filed, praying for an order from the court to authorize him to dispose of the real estate of the said Pierre. In consideration of the facts alleged in said petition, and for divers other good and sufficient reasons, it is ordered that he be empowered as aforesaid."

In overruling the objection made to the title derived from the personal representative, this court said, p. 339: "The record of the county court shows that there was a petition representing some facts by the administrator who prayed for an order of sale; and the court took those facts into consideration, and for these and divers other good reasons, ordered that he be empowered to sell." Again this court say, p. 340: "After the court has passed on the representa-

tion of the administrator, the law presumes that it was accompanied by the certificate of the judge of probate, as that was a requisite to the action of the court. Their order of sale was evidence of that or any other fact which was necessary to give them the power to make it; and the same remark applies to the order to give notice to the parties. This is a familiar principle in ordinary adversary actions, in which it is presumed after verdict, that the plaintiff has proved every fact which is indispensable to his recovery, though no evidence appears on the record to show it; and the principle is of more universal application in proceedings *in rem* after a final decree by a court of competent jurisdiction over the subject-matter." Again, say the court: "The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party obtaining it." Several decisions by this court upon this particular point, will be found cited in the opinion above quoted as delivered by the late Justice Baldwin, who concludes that opinion with the following striking and cogent observations: "We do not," said that learned judge, (alluding particularly to the case of *Voorhees v. The Bank of the United States*, 10 Pet. 473,) "think it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that case and those which preceded it rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the States have followed, and this court has never departed from them. They are rules of property on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral actions, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed, than those made of the estates of decedents by order of those courts to whom the laws of the States confide full jurisdiction *over the subjects." By [* 387] the doctrine thus ruled, the decision of the circuit court is fully sustained, and, upon a review of the whole case, it is the opinion of this court that the decision of the circuit court be and the same is hereby affirmed.

ALANSON SALTMARSH v. JAMES W. TUTHILL.

12 H. 387.

An appeal claimed and allowed, and an appeal bond given, in an action at law, do not operate as a *supersedeas*; a writ of error sued out after the expiration of ten days from the judgment day, cannot so operate; and no court of the United States has any equitable power to correct the mistake and set aside an execution in such a case.

MOTION for a *mandamus* to compel the judge of the district court of the United States for the middle district of Alabama, to order an execution to issue. The facts sufficiently appear in the opinion of the court.

Pryor and Seward, for the motion.

J. A. Campbell, contra.

[* 389] * TANEY, C. J., delivered the opinion of the court.

The judgment in this case being in a common-law proceeding, it was not removed to this court by the appeal; and, consequently, the appeal bond did not operate as a *supersedeas*.

The writ of error afterwards sued out, has brought the case regularly before this court. But as it was not sued out within ten days after the rendition of the judgment, the writ of error bond does not stay the execution under the act of 1789.¹

Nor is there any equitable power in the circuit court to stay the execution, upon the ground that a mistake as to the manner or time of removing the case was committed. And it is immaterial in this respect whether it was the mistake of the party or the court. For this court has never deemed the tribunals of the United States authorized to dispense with the express provisions of the acts of congress regulating appeals and writs of error, upon any equitable ground. No such power is given to them by law. It was so decided in this court in *United States v. Curry and others*, 6 How. 113; and *Hogan and others v. Ross*, 11 ib. 297. The circuit court, therefore, erred in setting aside the execution which the plaintiff had issued on the judgment.

But we do not think it necessary at this time to determine whether this court has the power to issue the *mandamus*, requiring the circuit court to issue the execution. Because we are satisfied from the facts before us, that the circuit court, without any coercive process, will conform to the opinion of this court, and issue execution when informed of this decision.

The question, therefore, as to the power of this court to issue the *mandamus*, is, for the present, reserved.

¹ 1 Stat. at Large, 78.

SAMUEL DINSMAN, Plaintiff in Error, v. CHARLES WILKES.

12 H. 399.

In an action by a marine against his commanding officer, for inflicting punishment on him for refusing to do duty in a foreign port, upon the ground that the time of his enlistment had expired and he was entitled to his discharge, *held*.

1. That the right to determine the question whether the plaintiff was then and there entitled to his discharge, was, for the time being, in the commander; and it was the duty of the plaintiff to submit to that determination and look for redress on his return home; and for any mere error in judgment in this matter, no action would lie against the commander.
2. That the refusal of the plaintiff to submit to the decision of the commander, was an act of insubordination, for which he was liable to punishment.
3. That if the defendant, in the honest exercise of his judgment, believed it proper to confine the plaintiff on shore, he had a right to do so.
4. If the punishment inflicted on the plaintiff, was, in any degree, or in any manner, aggravated by malice, or a vindictive feeling, or a desire to oppress him, on the part of the defendant, he is liable to an action.

Certain questions as to the admissibility of evidence in the particular posture of the facts, considered and ruled.

THE opinion of the court makes intelligible the grounds upon which the various questions arose, save that the questions, concerning the admissibility of evidence, require the following exceptions to be stated.

"On the further trial of this cause, and after the foregoing evidence was given on the part of the plaintiff, and which is made part hereof, the defendant, for the purpose of showing probable cause and the absence of malice, on his part offered to read in *evidence the following paper marked A; (letter of [*391] Lieut. Emmons,) having first proved that the same was in the handwriting of Mr. Emmons, who was a lieutenant of said ship, and that the other signatures are genuine; which said paper being in the possession of the defendant, as an official paper, was produced on the trial by the defendant; to the admissibility of which said letter, the plaintiff, by his counsel, objected; but the court overruled the objection, &c.¹

Fourth Bill of Exceptions.

[*392]

"On the further trial of this cause, and after the evidence contained in the foregoing exceptions, and made part hereof, and after the defendant had given evidence of particular instances of insubordination and misconduct among the crew of the said ship Vincennes, from the time of her arrival at Oahu, to the time of the imprisonment of the plaintiff, in order to prove that the discipline of the same was relaxed and impaired; and after the defendant had

¹ This letter related to the state of feeling of the marines, in one vessel of the squadron, as observed by the writer.

closed his evidence in chief, the plaintiff, to rebut the same, offered to read from the log-book of said ship, at a date after her said arrival, to wit, "that on the 16th day of October, 1840, at the said island, a certain Leo Weaver and Henry Waltham, two of the crew of said ship, were flogged thereon, the first with sixteen lashes, and the last with eighteen lashes, for desertion, insolence, and neglect of duty; and that the same did not appear by said log-book to have been done by the sentence of a court-martial; but the court refused said offered evidence, and the plaintiff excepts thereto.

Fifth Bill of Exceptions.

"Upon the further trial of this case, after the evidence contained in the foregoing exceptions made part hereof had been given, and after the plaintiff and defendant had both closed their evidence in chief, and after the defendant had given evidence that he had, subsequent to the sailing of the said squadron, shown marks of favor to the plaintiff, and had promoted him to the rank of corporal, in order to repel any inferences of malice on his part towards the plaintiff; but the plaintiff offered evidence tending to prove that the defendant claimed his right to hold the plaintiff in the said squadron under and by virtue of an act of congress, approved March 2, 1837,¹ entitled

"An act to provide for the enlistment of boys, &c." And [*393] further offered to prove "that the defendant had failed, and refused to certify, as required by said act, by reason whereof the plaintiff had been and was denied the benefit of the additional pay, as is by said act provided. And the plaintiff offered this evidence to rebut that of the defendant, and to show a continuing malice on his part towards the plaintiff; but the court refused the said offered evidence, and the plaintiff excepts.

Sixth Bill of Exceptions.

"On the further trial of this case, and after the evidence contained in the foregoing exceptions, made part hereof, and after the evidence in chief on both sides had been closed, and after the defendant had given evidence to prove that at the time the plaintiff was confined in said fort there were merchant seamen of the United States confined there, for the purpose thereby of inferring a knowledge by the defendant that said fort was a proper place for the imprisonment of the plaintiff:—

"The plaintiff, by way of rebutting the same, offered evidence tending to prove that it was a general and uniform practice and custom in the naval service at the time aforesaid, and long before,

as well established, to confine on the armed ships of the United States in any foreign port, any and all merchant seamen of the United States, who might there deserve such confinement by reason of their own ship or master not being able to confine them; which offered evidence the court refused, and the plaintiff excepts thereto."

May, for the plaintiff.

Bradley, contra.

*TANEY, C. J., delivered the opinion of the court. [* 401]

This case was before the court on a former occasion, and is fully reported in 7 How. 89. The present defendant in error was then the plaintiff, and the judgment of the circuit court was reversed, and a *venire de novo* awarded, the new trial to be governed by the principles decided by this court. Upon the trial under the mandate the judgment was in favor of the present defendant, and the plaintiff thereupon brought this writ of error. The testimony, so far as the questions of law upon the merits are concerned, is substantially the same with that offered at the former trial.

The case, as it now comes before the court, is somewhat confused by the number of instructions asked for by the counsel for the different parties, and which are merely given or refused, without any explanatory instructions by the court itself. This mode of proceeding complicates the case and makes it difficult to understand, from the exceptions, what principle of law the circuit court intended to decide.

* But it would seem, from the various instructions moved [* 402] for by counsel and given or refused, that the court likened the case to a suit for a malicious prosecution, and supposed it was to be governed by the same principles. And if the circuit court understood the opinion of this court to be placed on that ground, they were evidently mistaken. For by referring to the report of the case, in page 130, it will be seen that the court said, in express terms, "that for acts beyond his jurisdiction, or attended with circumstances of excessive severity, arising from ill-will or a depraved disposition, or vindictive feeling, he can claim no exemption."

The case has no analogy to a suit for a malicious prosecution. That action will lie only in cases where a legal prosecution has been carried on without a probable cause. *Johnston v. Sutton*, 1 D. & E. 524. The action was originally applied to criminal proceedings; to cases where a party had maliciously, and without probable cause, procured the plaintiff to be indicted or arrested for an offence of

which he was not guilty. In cases of that kind, where the facts are admitted, or found by the jury, the court, and not the jury, decide whether there was probable cause or not for the prosecution; and if there was probable cause, an action for malicious prosecution will not lie, although the party who procured the arrest or indictment was actuated by malicious motives. And the reason for the rule, as stated by Blackstone, 3 Com. 126, is, "that it would be a very great discouragement to public justice if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried." The action has been extended to civil as well as criminal cases where legal process has been maliciously used against another without probable cause. But the action for a malicious prosecution is the only one in which the party is not liable, although he acts from malicious motives, and has inflicted unmerited injury upon another. The rule is not of a character to recommend it to favor; nor to induce a court of justice to extend it beyond the limits to which it has heretofore been confined. And this is not an action for a malicious prosecution; but for an assault and false imprisonment. And whether the acts charged were done or not, and what motives actuated the defendant, are questions of fact exclusively for the jury; and probable cause or not is of no further importance than as evidence to be weighed by them in connection with all the other evidence in the case, in determining whether the defendant acted from a sense of duty or from ill-will to the plaintiff.

It is an action by a marine against his commanding officer, for punishment inflicted upon him for refusing to do duty, in a foreign port, upon the ground that the time of his enlistment had expired, and that he was entitled to his discharge. The case is one of much delicacy and importance as regards our naval service. For it is essential to its security and efficiency that the authority and command confided to the officer, when it has been exercised from proper motives, should be firmly supported in the courts of justice, as well as on shipboard. And if it is not, the flag of the United States would soon be dishonored in every sea. But at the same time it must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice.

At the time these events happened, Captain Wilkes was in a distant sea, charged with the execution of a high public duty. He was bound, by all lawful means in his power, to preserve the strength and efficiency of the squadron intrusted to his care, and was equally

bound to respect the rights of every individual under his command. It is hardly necessary to inquire, whether the plaintiff was or was not entitled to his discharge at the time he demanded it. It is, however, very clear that he was not. But to guard against a misconstruction of this opinion, it is proper to say that the right to determine the question was, for the time being, in Captain Wilkes. In his position as commander, the law not only conferred upon him this power, but made it his duty to exercise it. If, in his judgment, the plaintiff was entitled to his discharge, it was his duty to give it, even if it was inconvenient to weaken the force he commanded. But if he believed he was not entitled, it was his duty to detain him in the service. Captain Wilkes might err in his decision. But that decision, for the time being, was final and conclusive; and it was the duty of the plaintiff to submit to it, as the judgment of the tribunal which he was bound by law to obey; and for any error of judgment in this respect, no action would lie against the defendant.

Nor did the belief of the plaintiff as to his rights furnish any justification for his disobedience to orders. For there would be an end of all discipline if the seamen and marines on board a ship of war, on a distant service, were permitted to act upon their own opinion of their rights, and to throw off the authority of the commander whenever they supposed it to be unlawfully exercised. And whether the plaintiff was legally entitled to his discharge or not, his disobedience, when the question had been decided against him by the proper tribunal, was an act of insubordination for which he was liable to punishment.

So, too, as regards the degree of punishment to which he was subjected. It was the duty of Captain Wilkes to maintain *proper discipline and order among the officers and men [* 404] under his command, and if a spirit of disobedience and insubordination manifested itself in the squadron, he was bound to suppress it; and he might use severe measures for that purpose, if he deemed such measures necessary. And if, in his judgment, the continued refusal of the plaintiff to do duty made it proper to confine him on shore, rather than on shipboard, in order to reduce him to obedience,—or necessary as an example to deter others from a like offence, he was justified in so doing; and while he acted honestly and from a sense of duty, and with a single eye to the welfare of the service in which he was engaged, the law protects him. He is not liable to an action for a mere error in judgment, even if the jury suppose that milder measures would have accomplished his object.

But, on the other hand, he was equally bound to respect and protect the rights of those under his command, and to cause them to be

respected by others; to watch over their health and comfort; and, above all, never to inflict any severer or harsher punishment than he, at the time, conscientiously believed to be necessary to maintain discipline and due subordination in his ships. The almost despotic powers with which the law clothes him, for the time, and which are absolutely necessary for the safety and efficiency of the ship, make it more especially his duty not to abuse it. And if, from malice to an individual, or vindictive feeling, or a disposition to oppress, he inflicted punishment beyond that which, in his sober judgment, he would have thought necessary, he is liable to this action.

This is not a case where the punishment alleged to have been inflicted, was forbidden by law, or beyond the power which the law confided to him. For, in such a case, he would be liable whatever were his motives. But the fact to be ascertained in this case is, whether, in the exercise of that discretion and judgment with which the law clothed him for the time, and which is in the nature of judicial discretion, he acted from improper feelings, and abused the power confided to him to the injury of the plaintiff.

The case, therefore, turns upon the motive which induced Captain Wilkes to inflict the punishments complained of. And this question is one exclusively for the jury, to be decided by them upon the whole testimony. And the rule of law by which they must be governed in making up their verdict, is contained in a single proposition. It is this:—

If they believe, from the whole testimony, that the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command and the interest of the service in which he was engaged, then the plaintiff is [*405] not *entitled to recover. But, if they find that the punishment of the plaintiff was in any manner, or in any degree, increased or aggravated by malice or a vindictive feeling towards him on the part of Captain Wilkes, or by a disposition to oppress him, then the plaintiff is entitled to recover.

And, in deciding this question, they are to take into consideration the service in which Captain Wilkes was engaged; the place where these transactions happened; the condition of the vessels under his command; the spirit and temper of the marines and seamen, as he understood it to be, in his own vessel and the other vessels of the squadron, gathering his knowledge from his own observation as well as the information of others; also the nature and character of the voyage yet before him, and which it was his duty, if possible, to accomplish; and how far the conduct and example of the plaintiff might, in the judgment of the defendant, be calculated to embarrass

or frustrate it altogether, unless he was reduced to obedience. And, further, that, under the order to imprison him in the fort, if the jury believe it to be truly stated in the defendant's testimony, the plaintiff was left at liberty to relieve himself from confinement at any moment by returning to his duty.

But, on the other hand, the jury must likewise take into consideration the different punishments he received; his confinement in the fort on shore; the situation and condition of the place; the character of the persons by whose authority it was governed; his food; his clothing and general treatment; and whether Captain Wilkes, through proper officers, inquired into his treatment and condition during the time of his confinement. For, certainly, when, from whatever motives, he had placed him out of the protection which the ordinary place of confinement on shipboard afforded, in a prison belonging to, and under the control of, an uncivilized people, it was his duty, through proper and trustworthy officers, to inquire into his situation and treatment, and to see that it was not cruel or barbarous in any respect; and that he did not suffer for the want of those necessities which the humanity of civilized countries always provides even for the hardened offender.

As to the questions of evidence, we think the letter of Mr. Emmons, with the papers attached to it, mentioned in the first exception, was properly admitted, since it was calculated to make an impression on the mind of Captain Wilkes as to the temper and disposition of the marines in one of the vessels composing the squadron.

But the proceedings of the courts-martial, mentioned in the second exception in the cases of Ward and Riley, ought not to have been received. For some of the offences with which they *were charged, were committed a long time before the [* 406] refusal of the plaintiff to do duty, and were not, therefore, any evidence of a spirit existing at that time. And when the testimony in this exception is rejected, that offered by the plaintiff in the third exception to rebut it, will also be inadmissible, although it would be legal and admissible if the proceedings of the courts-martial could be legally received. But the evidence stated in both of these exceptions ought to have been refused.

The evidence stated in the fourth exception, as to the punishment of Weaver and Waltham, was properly rejected, as it can have no application to the matter in issue.

The opinion in the fifth exception is also correct. For, it appears from record that Captain Wilkes claimed the right to detain the plaintiff in service during the cruise, under the contract made by the plaintiff with Commodore Jones, in October, 1837, and not under

the act of March 2, 1837. He could not, therefore, certify that he had detained him under that act.

But the testimony offered by the plaintiff in the sixth exception ought to have been received. For, after the defendant had offered testimony to show that American seamen were confined in the fort at the time the plaintiff was imprisoned there, the plaintiff had a right to show that it was not the usual place of confinement, and that refractory seamen, who could not be safely confined on board their own vessels, were uniformly or generally confined on board American ships of war. The testimony on the part of the defendant was admissible to show that he was not actuated by vindictive feelings in imprisoning the plaintiff in the fort, and that offered by the plaintiff to rebut it, and to show the contrary. But neither was admissible for any other purpose. And it is for the jury to consider what degree of weight, if any, the testimony on either side mentioned in this exception is entitled to, in deciding upon the motives of Captain Wilkes, taking it in connection with all the evidence in the case.

These six exceptions are the only ones which relate to questions of evidence. The rest of them apply to the merits of the case, and to the principles of law by which it is governed. Upon these, we have already expressed the opinion of the court, without deeming it necessary to specify each particular instruction given or refused, that ought, in our judgment, to be affirmed or reversed. We have already said that there is but a single question of law and but one instruction proper. And, upon the grounds and for the reasons hereinbefore stated, the judgment of the circuit court must be reversed, and a *venire de novo* awarded.

18 H. 110.

JESSE SNEAD, late High Sheriff of Henrico County, and as such, Administrator *de bonis non* of ALBERT SEEKAMP, deceased, Appellant, v. JULIA M'COULL, Widow of NEIL M'COULL, CHARLES L. M'COULL, Administrator *de bonis non* of NEIL M'COULL, and the said CHARLES L. M'COULL, MARY P., JULIA L., and JOHN JAMES M'COULL, Heirs of NEIL M'COULL, WILLIAM SELDEN, and EDMUND CHRISTIAN, Marshal of the Eastern district of Virginia *et al.*

12 H. 407.

The levy of a *ca. sa.*, in 1817, was a release of the judgment lien on lands of the debtor, by the law of Virginia; and in this case there was no escape, or death in custody, to revive the lien, nor was any execution lien created by the 10th section of the Virginia act of 1819, which applies only to levies commenced after the date of the act.

Taking the poor debtor's oath, under the act of congress of January 6, 1800, (2 Stats. at

Large, 4,) did not revive a judgment lien, nor did a deed of assignment of his property by the debtor to the marshal.

Leave to amend was properly refused by the circuit court, at the hearing, as the proposed amendment would have presented a new case.

THE case is stated in the opinion of the court.

Johnson, for the appellant.

Robinson, contra.

* DANIEL, J., delivered the opinion of the court. [* 409]

This is an appeal from a decree of the circuit court of the United States from the eastern district of Virginia, dismissing the bill of the appellant who was plaintiff in that court.

On the 3d of December, 1814, Seekamp's administrators recovered a judgment in the circuit court of the United States for the eastern district of Virginia, against Neill M'Coull, for \$5,688 damages and costs. In February, 1817, this judgment was affirmed with costs, and damages at the rate of six per centum, for which the circuit court gave judgment accordingly, in May, 1817, when the mandate was produced.

* On the judgment a *ca. sa.* issued the 29th of July, 1817, [* 410] which was returned executed upon M'Coull, and a bond taken, with condition that he should remain within the bounds of the superior court of Henrico county. This admission to the jail limits seems to have been under the act of congress of January 6, 1800, 2 Stats. at Large, 4, expounded in *United States v. Knight*, 14 Pet. 316. See 13 Hen. Stat. 373, § 37, and 1 Rev. Code of 1819, 535, § 30.

In what way M'Coull got back into the custody of the marshal does not clearly appear; and perhaps it is not material. He seems while imprisoned to have petitioned to have administered to him the oath prescribed by the act of congress, for the relief of persons imprisoned for debt. The oath was administered on the 18th of July, 1821, and M'Coull then discharged from his imprisonment on this judgment.

Although this proceeding was under the act of congress, which has no provision requiring a conveyance from the debtor, a deed seems to have been executed by M'Coull, under the idea that the state law in 1 Rev. Code of 1819, p. 537, was in some way to be applied to the case. The deed is to John Pegram, then marshal of the eastern district of Virginia, and conveys to him and his successors in office, to be disposed of according to law, such interest as M'Coull, on the day of his discharge, had in any lands or other property

stating, however, on the face of the deed, that all the property had theretofore been conveyed by deeds of record.

It appears that on the 20th of September, 1812, a tract of land in Henrico, known by the name of Marion Hill, was conveyed by Walter Shelton, as commissioner, to M'Coull, and by M'Coull to John Parkhill, as trustee, to secure the purchase-money. M'Coull paid to Shelton the money secured by this deed of trust, but failed to get a deed of release from Parkhill.

Between June, 1814, and December, 1817, M'Coull sold, and by deeds of bargain and sale conveyed, to individuals, certain lots which were part of the Marion Hill tract.

M'Coull died intestate, leaving a widow, Julia, and five children, to wit: Ann, Charles L., Mary P., Julia L., and John J., the last three of whom were infants when this suit was brought.

On the 19th of February, 1829, by an agreement under seal, the widow and two eldest children of M'Coull, in consideration of \$1,000, transferred and surrendered to William Selden, a certain part of the Marion Hill tract; it being agreed that if they should, within six years, make to Selden a good title, he should in addition [* 411] pay to them, or their order, \$20 for each acre to which * such good title should be made, and if within the six years they should not make him a good title, then they were to surrender all right of property as well as possession.

On the 14th of September, 1829, a deed of release was made from Parkhill and Shelton, (the parties to the deed of trust of the 20th of September, 1812,) to Selden, which, after reciting Selden's purchase of part of the Marion Hill tract, (supposed to be of 100 acres,) and the desire of the widow and heirs that a deed of release should be executed to Selden for that part, contains a full release of the legal title from Parkhill to Selden.

About fourteen years after, M'Coull was discharged as an insolvent, to wit: in May, 1835, Seekamp's administrators filed their original bill, claiming that by their judgment they acquired a lien upon the lands of M'Coull; alleging that of the land purchased from Shelton a considerable portion remained in M'Coull's possession unsold at the date of the deed to Pegram, "which by the provisions of the said deed was subjected to the payment of the said judgment;" charging that Selden purchased with knowledge of the said judgment and of the deed to Pegram, given to secure it; that Selden knowing from the situation of the affairs of M'Coull, and the lien of the plaintiffs, that no good title could be made him by the widow and heirs of M'Coull, did in fact pay them a very trivial consideration for the said one hundred acres, compared with the full value thereof; and claiming that

they have a valid subsisting lien upon the said one hundred acres, and that the same should be applied in satisfaction of their judgment.

The bill also mentions certain lands sold and conveyed by Bartlett Still to M'Coull, states that these lands remained in M'Coull's possession till his death, and claims that they are liable under the deed to Pegram to satisfy said judgment.

The plaintiffs further claim that they have a right to subject all the other lands and property conveyed in said deed executed for their benefit, to the satisfaction of said judgment in whatever hands they may be found, as said deed operated to bind the property thereby conveyed, from the date of its admission to record.

The bill makes defendants, the widow, heirs, and administrators of M'Coull, William Selden, and Edmund Christian, the successors (as marshal) of John Pegram, and besides asking certain discoveries, prays the court to decree a sale of the said one hundred acres of land conveyed Selden, and the two parcels conveyed by Still to M'Coull, and whatever land or other property, subject to the debt of Seekamp's administrators, may have descended or come to the hands of the widow and heirs of M'Coull, and that so much of the proceeds of said sale as may be necessary *to pay off and dis- [*412] charge said judgment with interest and costs, may be applied in satisfaction thereof.

Selden alone filed answer. In this answer, he insists that by the deed of September 14, 1829, from Parkhill and others, the legal title is vested in him, and states, that being aware of many outstanding incumbrances upon the equitable right, he has endeavored to take in those incumbrances which gave preferable liens.

The answer of Selden sets forth, amongst other incumbrances prior in time to the deed to Pegram, one created by a judgment of Taylor and Hay rendered in their favor in April, 1821, in a state court of Virginia, against M'Coull, and a *ca. sa.* levied on his body the 28th of April, 1821, under which he was discharged the 21st of July, 1821, by taking the oath of an insolvent debtor; and states that Selden, being advised that this execution of *ca. sa.* being levied after the 1st of January, 1820, when the act in the 1st vol. of Rev. Code of 1819, p. 528, § 10, commenced, bound the real estate of M'Coull from the time when it was levied, obtained an assignment of this judgment from the representatives of William Dandridge, for whose benefit the judgment was obtained. This lien being prior to the date of the deed to Pegram, under which the plaintiffs claim, he insists has preference over their claim.

He insists that the lien of the plaintiff's judgment was extinguished by the levy of his execution on the body of M'Coull, and that the

plaintiff can have no other lien on the property of M'Coull, except the deed made to Pegram. That amongst the deeds made by M'Coull prior to that last mentioned, was one bearing date on the 26th day of May, 1814, and another on the 2d of January, 1821, for the benefit, amongst others, of the wife of M'Coull, in consideration of the relinquishment of her dower in the property of her husband, sold and aliened by him ; which deeds, as Selden claims also under the widow and heirs of M'Coull, he insists should enure to his protection against the claim of the plaintiff. After this answer an order was made June 6, 1836, giving leave to the plaintiff to amend his bill. Nothing was done under this leave for six years, namely, until June 9, 1842, when a bill of revivor was filed in the name of the administrator *de bonis non*, of Seekamp against Charles L. M'Coull, administrator of Neill M'Coull. By an order made on the 19th of December, 1843, it is stated that the suit was abated as to the widow of M'Coull, and that the plaintiff had by leave, on that day, filed an amended bill, making defendants, the representatives of Dandridge, for whose benefit the judgment in favor of Taylor and Hay had been rendered, and that those representatives had filed their answer.

[* 413] * This answer insists that the lien of the representatives of Dandridge (claiming through Taylor and Hay) is preferable to that of the plaintiff; that the plaintiff, by taking his *ca. sa.*, released the lien of his judgment, and can claim only by force of the surrender made by M'Coull when he took the insolvent oath ; the *ca. sa.* of Taylor and Hay, levied the 28th of April, 1821, constituted (by force of the statute of Virginia) a lien on lands from the time of levy, which gave their claim a priority over that of the plaintiff; that moreover, Taylor and Hay (and in their stead the representatives of Dandridge) have a right to be substituted for James Carter and John M'Coull, (sureties for Neill M'Coull to Taylor and Hay,) for whose benefit there was executed a deed of the 10th of January, 1821.

The cause was argued at the May term of 1846, and the court took time to consider ; at the June rules of the court in 1848, a notice was issued by Seekamp's administrator, that he would apply for leave to file an amended and supplemental bill, which application being opposed on the part of Selden and of those who had become some time previously purchasers from him, the court on the 7th of June, 1849, after hearing the petition and the objections made thereto, refused leave to file the proposed bill either as an amended or supplemental bill, and decreed that the bill of the complainants be dismissed with costs.

The important question upon this record, and that upon the determination of which the decree of the circuit court should be affirmed

or reversed, is a question of priority between these parties, growing out of their respective acts and the legal consequences flowing from those acts, with reference to the subject claimed by them both, as having been once the property of Neill M'Coull, from whom the rights of both parties are deduced. For the appellant, it is insisted, that by operation of his judgment in May, 1817, the levy of his *capias ad satisfaciendum* on that judgment in July of the same year, and the discharge from custody of M'Coull under the insolvent law of the United States, and his deed at the time of that discharge to Pegram, the marshal, there was created a lien in behalf of the appellant on all the property held by M'Coull, including the land purchased by the defendant, Selden, creating a priority in favor of the appellant which neither the acts nor the rights of Selden, nor of others deriving title from M'Coull subsequently to the judgment, execution, and deed above mentioned, could devert. On behalf of Selden and those whom he is intrusted to protect, it is contended, that whatever might have been the capacity of the appellant's judgment to bind the lands of M'Coull from the date of the judgment, by a proceeding under it such as would have been *proper to maintain and [* 414] enforce that lien, yet by the election of the appellant to take the body of M'Coull and to retain him in custody from 1817 to 18th of July, 1821, the lien of the judgment was released, and *quoad* all property of the debtor at the date of the judgment could be revived by one of two events only, namely, the escape of the debtor from prison, or his death whilst in custody, the occurrence of neither of which events is pretended. That the act of congress under which M'Coull was discharged as an insolvent debtor, created or preserved no specific lien, and the deed to Pegram could have no such effect, and conveyed, if any thing, only such interest as M'Coull possessed at the date of that deed, the deed itself declaring by its terms, that all the property of M'Coull had been theretofore conveyed by prior conveyances of record. That by the acquisition of the legal title to the land in dispute from Parkhill, to whom the legal title had been conveyed by M'Coull, three years anterior to the judgment against him by the appellant and the purchase by Selden, of the widow and heirs of M'Coull, and the assignment to him of the lien created by the judgment in favor of Taylor and Hay, against M'Coull, and the discharge of the latter under a *capias ad satisfaciendum* sued on that judgment and executed on the 28th of April, 1821, previously to the deed to Pegram, Selden had obtained a complete title to the land in question, which could not be overreached or affected by the judgment of the appellant. The truth or the incorrectness of the positions assumed by these parties respectively, must be settled by a proper

construction of the laws of the State within which the land in dispute is situated, and within which all the proceedings referred to have occurred.

By the decisions of the highest tribunal in Virginia, the law of that State, prior to the statute of 1819, with respect to the lien of judgments, has been expounded in very close conformity with the common and statute law of England, from which it appears to have been adopted. Thus we find it laid down by compilers and by commentators upon the law of England, that the lien of judgments upon lands in that country was created by the statute *de mercatoribus*, also styled the Statute of Acton Burnell, 11th of Ed. I., and by the Statute of Westminster 2d, 13th Ed. I. cap. 18, by the latter of which statutes the writ of *elegit* was given by enacting, that "he who recovereth in debt or damages, may have either a *feri facias* of the chattels of the debtor, or a writ on which the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plough, and half of his land, until the debt be levied upon a reasonable price or extent." *Vide* Bacon's Abridg. tit. Execution A, referring to the statutes above mentioned, and citing Hobart, 60, and 2 Roll. Abr. 475.

[* 415] * It is said by Bacon, on the authority of Dalton's Sheriff, 144, that the statute of 25th Ed. III. cap. 17, subjected the person of the debtor and gave the *capias ad satisfaciendum* against him in debt, detainue, &c., in the case of a common person, though by this same compiler it is said, that doubts have been suggested down to a period as late as the time of Lord Mansfield, as to the mode by which a proceeding existing at common law confessedly in behalf of the king alone, and affecting so gravely the personal liberty of the subject, had been placed at the discretion of private persons. Leaving these questions concerning the remote origin of the different modes of final process, as belonging peculiarly to the province of the antiquary, we proceed, so far as is necessary for the decision of the case before us, to ascertain the effect of them as settled by judicial interpretation in England, and in the jurisprudence of Virginia, upon which by custom and by statutes they may have been ingrafted. The force and operation of these different modes of final process in England, in reference both to the parties resorting to them and to those on whom they are brought to bear, will be seen under the several divisions of the title Execution in the 3d vol. of Bacon. They have also been traced with his characteristic perspicuity and method by Mr. Justice Blackstone, from p. 414 to p. 421 of the 3d vol. of his Commentaries, chap. 26. In 3d Bacon's Abr. Execution D, p. 393, the law is thus stated: "When the plaintiff has judgment, he has it

in his election to sue out what execution he pleases; but he cannot regularly take out two different executions on the same judgment, nor a second of the same nature unless upon failure of satisfaction of the first. Therefore, if the plaintiff, upon a judgment or recognizance at common law, sues out an *elegit*, he can have no *capias ad satisfaciendum* afterwards to take the body, because he hath determined his choice by that writ to the goods and chattels and a moiety of the land, which being entered upon the record, he is thereby estopped, and though he takes but an acre of land in execution, yet it is held a satisfaction of the debt, be it never so great, because in time it may come out." The exceptions to this restriction on the plaintiff's right to another execution, are the return of *nihil* on the first, and the return by the sheriff that he hath levied only on the goods of the defendant; because the plaintiff being entitled to levy on the land also, should not be precluded from the benefit conferred by the statute. But if the land be delivered, though of never so little value, that will be a bar, for the sheriff hath delivered the moiety of the land according to the statute. For this are cited Bro. *Elegit*; 15 Roll Abr. 896; Hob. 57; 5 Leon. 87; 2 Bulst. 97, and other authorities. In conformity with the law as just stated, is the doctrine of Mr. Justice Blackstone, who *concludes his remarks upon this [* 416] subject in the following words, vol. 3, p. 419: "This execution or seizing of lands by *elegit* is of so high a nature, that after it the body of the defendant cannot be taken, but if execution can only be had of the goods because there are no lands, and such goods are not sufficient to pay the debt, a *capias ad satisfaciendum* may then be had after the *elegit*, for such *elegit* is in this case no more than a *feri facias*, so that body and goods may be taken in execution, or lands and goods; but not body and land too, upon any judgment between subject and subject in the course of the common law." The origin and effect of the *elegit* have been thus dilated upon, as proper to define the foundation and effect of the lien of a judgment upon lands, to show that it mounts no higher than the *elegit* itself, or the capacity of the judgment creditor to resort to that process, and that where such capacity was wholly taken away or suspended, the lien was affected in the same degree. With regard to the effect of the *capias ad satisfaciendum* upon the rights of the parties to a judgment, we are told by Blackstone, vol. 3, p. 415, that "the writ of *capias ad satisfaciendum* is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded, and, therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or his goods."

So in 3d Bac. Abr. tit. Execution D, p. 395, it is said: "It was formerly held, that if a person taken on a *capias ad satisfaciendum* died in execution, the plaintiff had no further remedy, because he had determined the choice by this kind of execution, which, affecting a man's liberty, is esteemed the highest and most rigid in the law, and for this are cited *Foster v. Jackson*, Hob. 52; *Williams v. Cutteris*, Cro. Jac. 136; and *Rolt Abr.* 903; and it has been ruled, that if the plaintiff consent to the defendant being discharged out of execution upon an agreement, he cannot afterwards retake him, although the security given by the defendant on his discharge should afterwards be set aside; *vide* 4 Burr. 2482; 1 T. R. 557; 2 East, 243. And as late as 1806, the following language is held by the lord chancellor in the case *ex parte* Knownell, 13 Ves. 193: "Considering the bankruptcy out of the case, it is clear that by the taking the body in execution the debt is satisfied to all intents and purposes. If the debtor being in execution becomes a bankrupt, the creditor, in reason and justice, must have a right to elect; not having contemplated that event, which deprives him of the fruit of his execution. But when the commission has previously issued, and the creditor therefore takes

his execution, apprised of the disposition to be made of the [* 417] effects, and that there may be a "certificate and has his choice, that step upon the same reason must be an election, and the debt is satisfied, whether by payment or by having the body in execution is not material." The only known exceptions to the effect of the *capias ad satisfaciendum* executed are, 1st, the provision of the statute of 21st Jac. 1st, cap. 24, that if the defendant shall die while charged in execution, the plaintiff may, after his death, sue out a new execution against his land, goods, or chattels; and the instances of an escape or rescue of the party taken in execution; in which two last instances it has been ruled that, although the sheriff is thereby liable because he ought to have taken the *posse comitatus*, yet the plaintiff may take out any new execution, and shall not be compelled to take his remedy against the sheriff, who may be dead or insolvent.

From this view of the law, as ruled by the English courts, the following points may be considered as conclusively ruled in that country: 1. That the lien of the judgment results entirely from the right of the plaintiff to elect to charge the goods and the moiety of the lands of the debtor. 2. That the election so to charge them by an *elegit* executed, discharges from liability the body of the defendant and the remaining moiety of the lands. 3. That the *capias ad satisfaciendum* executed, is *pro tanto* a satisfaction of the judgment, which releases *proprio vigore* any previous lien upon the lands, and inhibits all recourse against the goods and chattels or lands of the

debtor, with the exceptions of the instances of death, whilst charged in execution, or of an escape from prison, or a rescue.

Recurring now to the laws of Virginia, upon these same subjects, we find as early as the year 1748, 22 George II., the statute of the colonial legislature beginning with the following preamble: "Whereas, by the common law of England and divers acts of parliament, which are binding upon the subjects of this colony, all persons recovering any debt, damages, or costs, by the judgment of any court of record, may, at their election, prosecute writs of *fiery facias*, *elegit*, and *capias ad satisfaciendum* within the year, for the taking of the goods, lands, or body of persons against whom such judgment is obtained, to the end the said several writs issuing out of any of the courts of record within this dominion, and the manner of executing and returning the same may be uniform, and the mischiefs arising from incorrect forms and insufficient returns of such writs prevented, Be it enacted, &c." The first thing which strikes the attention in reading this preamble is not only its explicit recognition of the common law and statutes of the mother country, with respect to the binding force and operation of judgments, but also of the modes, and the effect of those modes, as they were known in the mother

* country, to be carried into operation. Thus it is declared [*418] that there shall be a *fiery facias* for taking the goods — an *elegit* for taking the lands, and a *capias ad satisfaciendum* for taking the body of any person against whom such judgment is obtained. Not only are these forms of proceedings adopted with the import which their mere terms might convey, but they are adopted with direct reference to the common law and statutes of England, (and of course to the judicial interpretations of the law,) as decisive of their operation and effect. The statute then proceeds to prescribe the forms of these several writs, and the returns to be made upon them, following, it is believed, literally, the forms in the courts of law in England, with such exceptions only as the difference in situation and the style of the courts rendered indispensable; and in the 3d and 4th sections enacts the provisions contained in the stat. of the 21st of James I. cap. 24, authorizing the renewal of execution against the lands and goods of a debtor dying in execution, and protecting the title of purchasers from the prisoner to lands *bona fide* sold by him for the payment of any of his creditors, at whose suit he shall have been in execution, and the money paid or secured, to be paid to such creditors with their privity in discharge of his debts, or some portion thereof.

The construction of this statute, which, up to the revisal of the laws of Virginia made in 1819, and going into effect in 1820, controlled the question of judgment lien, and the rights of purchasers

from a debtor in execution is understood to be definitively settled, and to have established the rules in the State in conformity with the doctrine of the English courts, that the lien of a judgment depends entirely on the right or capacity of the plaintiff to sue out an *elegit*, and that by electing a *capias ad satisfaciendum*, the lien of the judgment is so far destroyed as to be inoperative, except in the instances of death in execution, and of an escape. Indeed, the provision in the statute of 21st James I. and in the Virginia act of 1748, which protect *bond fide* sales by debtors in execution, are wholly inconsistent with the idea of a continuation of a judgment lien during the operation of a *capias ad satisfaciendum* executed, for the lien of a judgment is a legal lien commencing and coeval with the judgment itself, and unless released by charging the debtor in execution, would, by its own force and effect, go back to the date of the judgment, and override all mesne alienations or rights of every description. But this part of the Virginia statute of 1748 has been clearly expounded by the supreme court of Virginia, in the case of *Bullock v. Irvine's Administrators*, reported in 4 Munford, 450, which was a suit brought to vacate a sale made by a debtor in execution to one of his creditors, and which sale the chancellor had decreed to be void as [* 419] to creditors * under the laws of the State concerning executions. The supreme court, in reversing the decree of the chancellor, uses this language: "That instead of the decree rendered by the chancellor in this case, he ought to have directed an issue, to try what was the amount of the consideration which passed from the said Hannah Bullock to James Bailey (the debtor in execution) for the land in question, and whether there was any secret agreement or understanding between the said parties, that the said land was to be holden by the former for the use and benefit of the latter. The court is further of opinion, that if it shall turn out upon the issue aforesaid, that a reasonable consideration did pass as aforesaid, and that there was no such secret agreement or understanding, that then and in that case, the bill of the appellees should be dismissed, the transaction in that view being only the preference of one *bond fide* creditor over another." Thus it is seen that the *bona fides* of the transaction, and not the quality or extent of the legal lien, determined the validity of the transaction, for the existence of such a lien would have deprived the debtor of all power of alienation.

In the revisal of the laws of Virginia, made in the year 1819, (going into operation in the year 1820,) a provision was introduced by the tenth section of the law concerning executions, declaring that every sale, conveyance, and transfer of any lands or tenements made by any person charged in execution for any debt or damages, shall

be absolutely null and void, as to the creditor at whose suit he is so charged in execution, unless such sale, transfer, and conveyance be absolute and *bonâ fide*, and be made for the payment of the debt and damages due to such creditor or creditors; and that all executions of *capias ad satisfaciendum* levied after the commencement of this act, shall bind the real estate of the defendant from the time when they shall be levied. It has been insisted, that this execution lien, given by the 10th section of the act of February, 1819, so attaches upon the lands and tenements of the debtor, as to cut out all junior incumbrances by judgment, whilst the debtor remains in execution, although the regular proceedings be had upon such junior judgments to enforce the lien created by them (as judgments) upon the lands of the debtor. The first interpretation given to the 10th section of the statute of 1819, by the supreme court of Virginia, was in accordance with the position just mentioned, as will be seen by the case of *Jackson v. Heiskill*, 1 Leigh, 257. But the case of *Jackson v. Heiskill* having been decided by a bare quorum of the court, and by a bare majority of that quorum, the question so determined was reconsidered by a full court, in the case of *Foreman v. Loyd*, &c., reported in 2 Leigh, 284; and by the court, with the exception of one judge, the case of *Jackson v. Heiskill* was [*420] overruled, and the following interpretation given to the 10th section of the statute of 1819, and to the execution-lien created thereby, namely: That, where several creditors recover judgment and sue out writs of *capias ad satisfaciendum* against the debtor, upon which he is taken and charged in execution; and then another creditor recovers judgment against the same debtor, and sues out an *elegit* on which his lands are extended, and a moiety of them delivered, and then the debtor is regularly discharged from the writs of *capias ad satisfaciendum* as an insolvent debtor, putting into his schedule the whole of his lands which had been extended under the *elegit*, the lien of the writs of *capias ad satisfaciendum* does not overreach and avoid the extent under the *elegit*. The case of *Rogers v. Marshall*, 4 Leigh, 425, is perhaps a still stronger illustration of the extent to which the execution-lien may be affected by a junior incumbrance; as in this last case there was no intervention of a judgment, or of legal process, to operate against the execution lien; but, in this instance, between the period of the judgment rendered and the *capias ad satisfaciendum* executed, sundry mortgages were made by the debtor to secure debts to other creditors. It was held that, by the actual service of the *capias ad satisfaciendum* on the debtor, the lien of the judgment was destroyed, that the creditor could only stand on the lien given in the *capias* executed by the

statute of 1819, § 10, and that, therefore, the mortgagees were entitled to precedence. The same doctrine is affirmed in the case of *Ieake v. Ferguson*, as late as 1846, and reported in 2 Grattan, 419.

Upon the review here taken of the decisions of the courts in England upon the subject of judgment lien, and of the interpretation put by the supreme court of Virginia upon the statutes of that State of 1748, reenacted in the revisals of 1794 and 1803, and of 1819, we are brought necessarily to the following inquiries: 1. What lien was ever possessed by the appellant and those he represents upon the lands of M'Coull? And, 2. In what way has such lien been affected by the acts of appellant? It is certain that, on the 22d May, 1817, the appellant held a lien by judgment upon all the lands, tenements, and hereditaments of M'Coull; but it is equally certain that by levying a *capias ad satisfaciendum* upon the body of M'Coull, in July, 1817, he released the judgment lien upon such lands and tenements, according to the interpretation given of the statute of 1748, and also by that placed upon the statute of 1819, § 10. That the lien surrendered by the service of the *capias ad satisfaciendum* was never revived by the force of the former statute, inasmuch as there

was neither an escape nor a dying in custody; and that no [* 421] execution-lien was created by the service of * a *capias ad satisfaciendum*, and the admission of M'Coull to the oath of an insolvent debtor, in virtue of the 10th section of the act of 1819, as that section, by express language, applies only to executions levied after the commencement of the act of 1819, and M'Coull was already in custody under an execution levied in July, 1817, more than two years anterior to the passage of that act, and under process sued out under the statute of 1748, continued in the revisals of 1794 and 1803. In truth, the oath of insolvency administered to M'Coull was not in virtue of either of the state laws above referred to, but under the act of congress of the 6th of January, 1800, which oath of insolvency created no specific lien in favor of the appellant, and the deed to the marshal, which was neither ordered nor required by the act of congress, could create no such specific or exclusive lien, and upon its face it purports to create none; but, on the contrary, recites that all the property of M'Coull had been conveyed by deeds previously made and recorded. The only lien by execution upon the lands of M'Coull, in virtue of the statute of 1819, § 10, disclosed by the record, is that of Taylor and Hay, arising from a judgment rendered in a state court of Virginia against Neil M'Coull, in April, 1821, and that lien, whatever its effect may be, must enure to the benefit of Selden, who holds an assignment of the judgment against M'Coull from the beneficiaries thereof, it being prior in date to the deed of Pegram. The lien which

once existed, in virtue of the appellant's judgment, having been extinguished by the levy of the *capias ad satisfaciendum* upon the body of M'Coull, and there being no revival thereof by any of the causes known to the law, we are unable to perceive why Selden, who was a purchaser from the widow and heirs of M'Coull, might not fairly and properly obtain the legal title from Parkhill, in whom that title was vested, or get in the lien of the execution existing in favor of Hay and Taylor. By doing so, he invaded no right of the plaintiff, who had relinquished his judgment lien, and had acquired no other under the deed to Pegram, which professes to convey to him none, and to which he was no party. Selden, having paid his money, committed no wrong on the plaintiff by drawing to himself the elder legal title outstanding in Parkhill, and by fortifying it by the execution lien of Taylor and Hay, which clearly had precedence of the plaintiff.

After this cause had been heard in argument and taken under advisement by the circuit court, the plaintiff petitioned that court to permit him to file a further bill, by way of amendment and supplement to the original bill and bill of revivor previously filed in the cause; and, after being heard by counsel upon his petition, the court refused to grant the prayer thereof, on the *grounds [* 422] that the application was made at too late a period, and that the changes proposed by the plaintiff in the character of the cause would have been in reality the presenting of an entirely new case, rather than an amendment of the original bill. This refusal of the circuit court we hold to have been sound in principle; and it is sustained by the express language and authority of this court, in the case of *Walden et al. v. Bodley et al.*, which declares that, although "there are cases where amendments may be permitted at any stage of the proceedings in the cause, as where an essential party has been omitted; yet amendments which change the character of the bill or answer, so as to make substantially a new case, should rarely, if ever, be admitted after the cause is set for hearing, much less after it has been heard." *Vid.* 14 Pet. 156. Moreover, a fact which imparts greater force to the refusal of the circuit court to permit amendment at so late a stage of the proceedings is this, that the application to that court appears to have been accompanied with no evidence, and not even by an affidavit, to show that the amendments desired could not have been made portions of the original bill; on the contrary, it is manifest that they might have formed a part of the case as originally presented to the circuit court, if at any time it were proper to incorporate them with the subject-matter, and with the objects proposed by the original bill. The prayer of the original bill was limited to the enforcement of an alleged judgment lien upon specific prop-

Linton v. Stanton. 12 H.

erty purchased by the defendant, Selden, and to recourse against the heirs and widow of M'Coull, of whom Selden had purchased; the proposed change, by way of amendment and supplement, is a general bill for discovery and relief against all persons alleged or supposed to have been purchasers or grantees from M'Coull, and for satisfaction out of the property purchased by him, or to which he had title at the date of the original judgment in favor of Seekamp. Such an essential change in the character and objects of the cause, proposed, too, after a hearing, and when it was manifest that the object of the original bill, namely, — the lien of the judgment, no longer existed, could not have been accorded to the plaintiff by any sound rule of practice. On either aspect of his case, as presented by the appellant, we think that he established no ground for equitable interposition in the circuit court, and approving the decree of that court dismissing the bill of the appellant, we hereby order that the same be affirmed.

15 H. 189, 281.

DUNCAN LINTON, CHARLOTTE LINTON and her Husband, FRANCIS SURGETTE, STEPHEN DUNCAN, Guardian of MARY LINTON and JOHN LINTON, Minors, Plaintiffs in Error, v. FREDERICK STANTON.

12 H. 423.

A decision by a state court, in favor of a right claimed under an act of congress, does not entitle the losing party to a writ of error.

THE case is stated in the opinion of the court.

Johnson, for the motion.

No counsel *contra*.

[* 425] * TANEY, C. J., delivered the opinion of the court.

This is a writ of error to the supreme court of Louisiana for the eastern district, and a motion has been made to dismiss it for want of jurisdiction.

The plaintiffs in error, it appears, filed their petition in the third district court of New Orleans, against the defendant, to recover certain sums of money which they alleged were due to them on two promissory notes which had been executed by the defendant.

The defendant pleaded his discharge under the bankrupt law¹ of the United States, and at the trial offered in evidence the record of the proceedings in bankruptcy in the district court in which he had obtained his certificate. Objections were taken to the regularity and validity of this discharge, but they were overruled by the court, and judgment rendered for the defendant. The plaintiffs appealed

¹ 5 Stats. at Large, 440.

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to the supreme court of the State, where the judgment of the court below was affirmed, and this writ of error is brought to reverse that judgment.

The writ must, we presume, have been prosecuted under a misconstruction of the 25th section of the act of 1789, c. 20.¹

We have no jurisdiction over the judgment of a state court upon a writ of error, except in the cases specified in that section. And the jurisdiction of this court is there limited with great care and in plain terms. It gives a writ of error to this court where a party claims a right or exemption under a law of congress, and the decision is against the right claimed. Undoubtedly the defendant, in pleading his discharge under the bankrupt law, *claimed [* 426] a right or exemption under a law of congress. But in order to give jurisdiction something more is necessary; the judgment of the state court must be against the right claimed. In the case before us the decision was in favor of it, and consequently no writ of error will lie to this court under the provisions of the act of 1789.

And as we have no jurisdiction, we cannot examine into the objections made to the validity of the proceedings in bankruptcy. The judgment of the state court that they were valid, and the defendant thereby discharged from the debt due to the plaintiffs, is conclusive between the parties.

Nor has this court the power to examine into the other question which appears to have arisen as to the legal effect of certain promises which the defendant is alleged to have made after he obtained his certificate in the bankrupt court. The legal obligation of such promises depends upon the laws of the State in which they were made; and in a suit in a state court the decision of that question by the highest tribunal of the State cannot be reviewed in any court of the United States.

This case must, therefore, be dismissed for want of jurisdiction.

1 Wal. 512.

THE UNITED STATES, Appellants, v. ALEXIS PORCHE.

12 H. 426.

The act of May 26, 1824, (4 Stats. at Large, 52,) revived by the act of June 17, 1844, (5 Stats. at Large, 676,) limits the right to file a petition under a French or Spanish grant, to two years from the passage of the latter act.

APPEAL from the district court of the United States for the eastern district of Louisiana, in a proceeding on a petition for a title under a Spanish grant. The petition was filed March 8, 1848.

¹ 1 Stats. at Large, 85.

Crittenden, (attorney-general,) for the United States.

Henderson, contra.

[* 432] * TANEY, C. J., delivered the opinion of the court.

It is evident that the district court had no jurisdiction in this case, and the petition ought to have been dismissed.

The act of June 17, 1844, under which the petition was filed, extended to Louisiana the act of 1824, and revived such parts of it as had expired. Under this provision, the 5th section of the act of 1824 was revived, and became a part of the law of 1844. And by this section, the time for filing a petition by a claimant under a French or Spanish grant, is in express terms limited to two years from the passage of the law. The time limited, therefore, for filing a petition in Louisiana, expired on the 17th of June, 1846, and this petition was not filed until March 8, 1848, long after the time fixed by the law. 8 How. 119.

The acts of 1826,¹ and 1828,² referred to in the argument, can have no bearing on the question. They are not mentioned, nor in any manner referred to, by the act of 1844. They were special laws enlarging the time given by the act of 1824 to claimants in Missouri and Arkansas to file their petitions. But they are not extended to Louisiana by the act of 1844. Nothing but the act of 1824 is extended. As to the supposed waiver by the district attorney of his objection as to the time of filing the petition, by answering after his plea was overruled, it must be made, we suppose, upon a mistake as to the fact. For in his answer he insists upon the same defence. And he had a right to avail himself of it by way of answer as well as by plea. But if he had, in express terms, waived it, and entered his waiver on the record, it would not have given jurisdiction to the court, when the act of congress had not conferred it.

The objection to the regularity with which the appeal was brought up must also, we presume, have arisen from some oversight in the counsel. The record shows that it has been brought up regularly according to the provisions of the act of congress. The objection that an appeal will not lie on behalf of the United States, where the claim is less than one thousand acres, is too clearly untenable to require discussion.

And as the petition was not filed within the time limited by law, it is not necessary to examine into the merits or want of merits of the claim. The decree of the district court must be re-
[* 433] versed, * and a mandate issued directing the petition to be dismissed.

THE UNITED STATES, Appellants, v. EDWARD SIMON.

12 H. 433.

A claim founded on a Spanish order of survey, no possession having been taken, and no survey made, nor any act done under the alleged title since 1791, when the order of survey was issued, held to have been abandoned and the inchoate title extinguished.

APPEAL from the district court of the United States for the eastern district of Louisiana. The facts are stated in the opinion of the court.

Crittenden, (attorney-general,) for the United States.

No counsel *contra*.

GRIER, J., delivered the opinion of the court.

Edward Simon, the plaintiff below, filed his petition in the district court of Louisiana, praying the confirmation of his title to a tract of land on the bayou Sans Façon or Huffpower, containing six thousand four hundred arpens. He claimed by various mesne conveyances through Stephen Flores, who, on the 11th of November, 1791, petitioned Governor Miro for a grant of eighty arpens front on each side of said bayou; the petitioner being "desirous," as he states, "of establishing himself in the post of Opelousas." On the 20th of November, 1791, Governor Miro issued an order to Don Carlos Trudeau to establish the petitioner on the land for which he prays, in the usual form.

*The pleadings in this case do not allege, nor is there [* 434] any evidence to prove, that Stephen Flores ever "established himself at the post of Opelousas," or took possession of the land which he desired to have, or obtained a survey thereof, or did any other act showing an intention of fulfilling the known conditions by which such gratuitous concessions could be converted from an inchoate into a complete title. In March, 1820, more than thirty years after its date, the order of survey is transferred by a person calling himself Stephen Flores to John Thompson. In 1825, John Thompson filed his claim with the register; but no action was taken on it, as its genuineness was doubted. In 1836, it was again submitted by the present petitioner to the register and receiver of Opelousas, under the act of 1835, and afterwards reported against by the solicitor of the general land-office, because of "no inhabitation, no cultivation, no possession."

The land supposed to be described in this order of survey has been all, long since, surveyed and sold by the United States. Dur-

ing the twelve or thirteen years that the province of Louisiana was in possession of Spain and France, Flores showed no desire of complying with the conditions of his grant, in any way, or of obtaining a title for the land offered to him by this order of survey. For twenty years after the land passed to the United States, and after officers were appointed to receive and report claims for confirmation, no act is done to show that this mere equitable inchoate claim was not wholly abandoned. After a neglect of ten years and more to obtain a survey, to settle or improve the land, or take possession of it, the Spanish government was under no obligation, equitable or moral, to grant this land to Flores. As was said by this court in the case of *United States v. Boisdoré*, 11 How. 96: "The policy of Spain was to make gratuitous grants for the purposes of settlement and inhabitation, and not for those of mere speculation. The grantee might have his land surveyed or might decline; he might establish himself on the land or decline; these acts rested wholly in his discretion. But if he failed to take possession and establish himself, he had no claim to a title; his concession or first decree in such case had no operation."

The regulations of Morales, of 1799, sections 18, 19, 20, 21, and 22, warn those "who have merely asked for land," or "obtained the first decree by which the surveyor is ordered to measure it and put them in possession," from indulging the notion that they have any title to it, and peremptorily require that they should come forward and have their titles made out within six months. But, although

we may believe that these conditions were not rigidly ex-
[* 435] acted, there is no reason to suppose that persons * who have neglected to take possession, improve, or survey the lands, which they have requested to be given them, for ten, twenty, or thirty years, can have any just claim on the government for such lands, or to receive others in place of them. Such laches is conclusive evidence of abandonment, if not of their total want of genuineness. But certainly no court of equity can be required to enforce the specific execution of inchoate grants or contracts made without consideration, which have been buried for half a century, and are now exhumed merely for purposes of speculation.

The decree of the district court is therefore reversed and record remitted, with directions to dismiss the bill or petition of the plaintiff below.

THE UNITED STATES, Appellants, v. CONSTANCE LEBLANC, MODESTE LEBLANC, LOUIS LEBLANC, ASPASIA LEBLANC, JOSEPH LEON, and RAPHAEL BROISSARD, legal Representatives and Heirs at law of PIERRE LEBLANC, deceased.

12 H. 435.

A paper extracted from a Spanish register of land titles in Louisiana, purporting to contain only the recitals which usually precede a Spanish title in form, but adding no words of grant, held not to be evidence of any title.

APPEAL from the district court of the United States for the eastern district of Louisiana. The nature of the case and the material facts appear in the opinion of the court. The copy of the paper referred to was as follows:—

“Don Bernardo de Galvez, Colonel, &c. Having seen the * foregoing proceedings, performed by the commandant [* 436] of Attacapas, Don Alexander Declobet, respecting the possession which he had given to Peter LeBlanc, of ten arpens of front on the great prairie, with the depth of forty-two, bounded on one side by the lands of Louis Roque, and on the other by vacant lands, and recognizing these proceedings as regular, and that the concession of these lands can be made without injury to others, not having been claimed, but the proceedings acquiesced in on the part of those assisting in them; approving as we do approve, and using, &c. New Orleans, 5th of January, 1777. Don Bernardo de Galvez, by order of his lordship, Don Joseph Foucher.”

“*Register's Office, New Orleans, La.*

I, Louis St. Martin, register of the land-office at New Orleans, Louisiana, do hereby certify the foregoing document to be a true copy, taken from one of the records of my office, entitled, ‘Libro 1 of French and Spanish Concessions.’

In faith whereof I hereunto subscribe my name, this 18th day of May, 1849.

(Signed,)

L. ST. MARTIN, *Register.*”

Upon this document, the district court confirmed the claim, and the United States appealed.

Crittenden, (attorney-general,) for the United States.

Jain and Taylor, contra.

TANEY, C. J., delivered the opinion of the court.

This claim appears to be a groundless one. The paper produced

is a copy, certified by the register of the land-office at New Orleans to have been taken from one of the records of his office, entitled, "Libro 1 of French and Spanish Concessions." The paper, as certified, is nothing more than the preamble usually inserted in Spanish grants, where a perfect and absolute title is intended to be given, as contradistinguished from the order of survey or first concession. And at the end of this preamble, is an &c., without any words of concession or grant, and this &c. is followed by the date, New Orleans, 5th of January, 1777, and the names of Don Bernardo de Galvez, by order of his lordship, Don Joseph Foucher.

It is not suggested that there has been any mutilation of the record, and the paper certified manifestly contains all of the instrument that was ever written in the record-book, and upon the face of it, from the manner in which it terminates with an &c. at the place where the granting clause usually begins; and from [*437] * the unusual manner, also, in which the names of Galvez and Foucher are arranged in the certified copy, it looks much more like a *formula* written in a record-book for the direction of clerks in making out for signature an absolute and perfect grant, than like a paper intended to convey the title to land. And, moreover, there is no evidence that the petitioners are the heirs of Pierre LeBlanc, named in the paper which is claimed to have been a grant to him; no evidence that he or those claiming under him ever took possession or exercised any act of ownership over it; and no evidence that any right or title was ever claimed to it, by Pierre LeBlanc or any one claiming under him, from the year 1777, when the paper bears date, down to June 16, 1846, when this petition was filed, being a period of sixty-nine years.

The decree of the district court must be reversed, and a mandate issued, directing the petition to be dismissed.

14 H. 189.

THE UNITED STATES, Appellants, v. JEANNETTE CAROLINE CASTANT, Widow in community of JACOB BRANDEGEE, deceased, and natural tutrix of her minor Children, namely: ODILE MADELINE, CAMILLUS JOHN, STEPHAINE, MARIE HENRIETTA BRANDEGEE, and of CAROLINE CLOTILDE BRANDEGEE, Wife of HENRY LLOYD, beneficiary Heirs and legal Representatives of said JACOB BRANDEGEE, deceased.

12 H. 437.

A petition to confirm a Spanish title in Louisiana, under the act of May 26, 1824, (4 Stats. at Large, 52,) must contain an allegation of the residence of the grantee in Louisiana, at the date of the grant, or previous to March 10, 1804; and the title shown must not be a complete title.

APPEAL from the district court of the United States for the eastern district of Louisiana. The case is stated in the opinion of the court.

Crittenden, (attorney-general,) for the appellants.

Soulé, contra.

* DANIEL, J., delivered the opinion of the court. [* 438]

The claim of the appellees in this case was preferred in virtue of the provisions of the act of congress of May 26, 1824, entitled : "An act enabling the claimants to lands within the limits of the State of Missouri, and the Territory of Arkansas, to institute proceedings to try the validity of their claims," namely : 4 Stats. at Large, 52, which provisions were revived by an act of congress of the 17th of June, 1844, and extended to the States of Louisiana and Arkansas, and to so much of the States of Mississippi and Alabama as is included in the district of country south of the 31st degree of north latitude, and between the Mississippi and Perdido rivers. 5 Stats. at Large, 676.

The original petition, presented in the name of Jacob Brandegee, sets forth that in pursuance of an order of Don Manuel Gayoso de Lemos, governor-general of Louisiana and West Florida, Don Carlos Laveau Trudeau, the royal surveyor, did, on the 15th of November, 1798, deliver to Donna Maria Manetta Laveau Trudeau, a tract of land, containing five hundred superficial arpens, situated and bounded as in the petition described, and as contained in a survey or figurative plan accompanying the petition, and as said to have been set forth in a survey alleged to have been previously made by Pintado, deputy-surveyor of Louisiana and West Florida. That afterwards, on or about the 12th day of November, 1798, the governor general, Gayoso de Lemos, made a regular concession or grant of this land to Donna Maria Manetta Laveau Trudeau ; that on the 31st of August, 1821, the said Donna Maria, conjointly with her husband, Josiah E. Kerr, sold and conveyed the land granted as aforesaid to Brandegee, and the deed to him is made an exhibit in this case. The petition further states, (referring to the metes and bounds of the grant, as described in the survey and evidences of title,) that the claim had been presented to the board of land commissioners, whose decision had been adverse thereto ; that the whole of said tract of land, or the greater part * thereof, [* 439] had either been sold by the United States, or confirmed to actual settlers. The petition then concludes with the prayer, that

the title of the petitioner may be held good, and that he may be entitled to enter an equal quantity of land in lieu of that which had been sold or confirmed to others. The petitioner, Jacob Brandegee, having departed this life after the institution of these proceedings, they were revived in the name of his widow in community, and of his children and heirs.

There is not exhibited with the petition or in any part of the proceedings, an original order from De Lemos to Trudeau, directing the latter to deliver to Donna Maria Manetta Trudeau the land mentioned, but there is a certificate signed by Carlos Laveau Trudeau, as royal surveyor, stating that he had delivered possession to Donna Maria Manetta Laveau Trudeau, of the tract of land of five hundred superficial arpens, corresponding with the figurative plan or survey, in which the boundaries are described with great precision. This certificate is followed by an instrument adopting and confirming it, signed by Gayoso De Lemos, styling himself Brigadier of the Royal Armies, Governor-General and Royal Vice-Patron of the Provinces of Louisiana and West Florida; and this instrument, after reciting the boundaries as contained in the certificate, concludes in the following terms: "And recognizing the same; approving them as we do hereby approve them, availing ourselves of the faculty which the king has given us, we grant in his royal name, to the aforesaid Donna Maria Manetta Laveau Trudeau, the aforesaid five hundred superficial acres of land; that she may use and dispose of them as her own property, in conformity with the aforesaid acts."

Upon the foregoing petition, and the documents above referred to, constituting all the evidence in this cause, the district court, on the 8th of June, 1849, ordered and decreed "that the grant made by the Spanish government to Donna Maria Manetta Laveau Trudeau, was a perfect one; that therefore the plaintiffs are entitled to the relief granted by the act of congress, approved on the 17th of June, 1844, and the act of 1824, to which it refers; and that it is therefore ordered and decreed that the grant is valid against the United States, and that the land described in the said grant and survey thereof, as part of the exhibits, containing five hundred superficial arpens, according to the metes and bounds as described in the said grant and survey, belongs to the petitioners holding under the original grantee." The same court then proceeds to declare: "That, whereas it is ascertained that a great part of the land is now held by titles emanating from the United States, it is further ordered, adjudged, and [* 440] decreed that, for all the land within the limits so * held, which has been sold or otherwise disposed of by the United States, the petitioners shall be, and they are hereby authorized to

enter in any land-office of the United States in the State of Louisiana a like quantity of public land elsewhere, in conformity with the provision of the 11th section of the act of congress, approved on the 26th of May, 1824."

This decision of the district judge is palpably inconsistent with the repeated adjudications of this court, upon the language and objects of the act of congress of 1824, and of the reviving act of 1844; and is indeed contradictory and inconsistent with itself, in the different grounds it assumes for its support. Before proceeding to a more particular examination of the decision of the district court, it seems proper to advert to the true position of the petitioner, or rather of the grantee, from whom his title is deduced, as described in the petition, and to inquire whether that position, as there described, apart from the question of the completeness or incompleteness of the grant, be one on which the jurisdiction of the district court could attach. Thus it must be remembered that in the enumeration in the act of 1824, of the qualifications requisite for claiming the benefit of that act, is the residence of the grantee within the province of Louisiana, at the date of the grant, or on or before the 10th day of March, 1804. This requisite of residence at one of the periods prescribed, can in nowise be received as a matter of form. It is of the essence of the right to invoke the aid of the act of congress, which was designed to confer a benefit on actual occupants or settlers. Such being its character, it should, therefore, in every instance in which that act is appealed to, be both averred and proved. In the case before us, the petition is wholly silent as to this qualification, and no proof is adduced as to its existence. For this omission alone, then, to aver a material, nay, the most material ingredient in the right to invoke the aid of the act of 1824, the petition presented no case upon which the jurisdiction of the district court could attach. This point has been ruled in the cases of *The United States v. Reynes*, in 9 How. 127, and of *The United States v. D'Autrive*, in 10 How. 609, and in other cases decided during the present term of this court. But let us view this case in other aspects of it, as exhibited upon the face of the petition and documents adduced to sustain it; and as it is characterized in the decree of the district court, in order to determine whether it be one within either the mischiefs or the remedies described or provided by the act of congress of May 26, 1824. By recurrence to the certificate of Trudeau, and to the figurative plan accompanying it, dated November 15, 1798, the quantity of the land and the boundaries thereof will be seen to have been *fixed and described [* 441] with the utmost precision, so as to leave no room for mistake or uncertainty. Turning next to the grant or concession by

Gayoso, on the 12th of December, 1798, it will be seen that the certificate of survey by Trudeau, and the figurative plan, are directly referred to, and all the lines and boundaries, the quantity of land, and, indeed, every *indictum* by which it had been described, are adopted by the grantor, in the very language of the certificate; and after such reference and adoption, the grant concludes in the following terms: "Approving them as we do hereby approve them, availing ourselves of the faculty which the king has given us, we grant in his royal name, to the aforesaid Donna Maria Manetta Laveau Trudeau, the aforesaid five hundred superficial acres of land, that she may use and dispose of them as her own property, in conformity with the aforesaid acts." The effect of these proceedings on the part of the Spanish governor, was to vest in the grantee a perfect legal estate, in the subject granted, the *titulo in forma*. The district court, upon the strength of these proceedings, declares what was unquestionably true, namely, that the title vested in the grantee by the Spanish authorities, was a perfect one; but the court goes on to deduce from this truth a consequence which it did not warrant, but which it entirely excluded, namely, that "therefore the plaintiffs are entitled to the relief granted by the act of congress, entitled, &c." The legitimate deduction from the facts above ascertained and admitted by the court, would have been to this effect, and therefore the district court could have no jurisdiction of the plaintiffs' petition, and that the same be accordingly dismissed. It is in this respect that the inconsistency of the decree of the district court, with the facts on which it professes to be founded, and with the acts of 1824 and 1844, and with itself, is made manifest. It first asserts the completeness of the title of the petitioner, and then declares it to be dependent on aids provided by statute; provided for the purpose of perfecting titles avowedly incomplete, which must continue forever incomplete, except for the means so provided for perfecting them. That interpretation of the acts of congress of 1824 and 1844, which declares them to be inapplicable to perfect legal titles, can no longer be questioned.

It has been expressly ruled in the cases already cited of *The United States v. Reynes*, in 9 How. 127, and in *The United States v. D'Auterive*, in 10 How. 609; and upon the same interpretation of the statutes above mentioned, have numerous cases been decided during the present term. The decree of the district court in this case is marked by other peculiarities which must deprive it of any validity whatsoever. The decree first decides that the title of Donna [* 442] Maria to the land in question is *good and complete as against the United States, and that therefore the land belongs to the petitioners, as deducing title from her. The decree then

proceeds to declare and order "that, whereas it is ascertained that a great part of the said land is now held by titles emanating from the United States, it is further ordered, adjudged, and decreed, that for all the land within the limits so held, which has been sold or otherwise disposed of by the United States, the petitioners shall be, and they are hereby authorized to enter in any land-office of the United States in the State of Louisiana a like quantity of public land elsewhere, in conformity with the provisions of the eleventh section of the act of congress, approved on the 26th of May, 1824."

Now, it is to be observed, in the first place, that there is in this case, on the part of the United States, a general denial of every fact contained in the petition; nothing is admitted directly or by implication. In the next place, there is not in this record to be found even an attempt to show a grant or confirmation of any portion of this land by the United States to any person whomsoever; nor the possession of it, nor of any portion of it, by any person at any time; not even by the petitioners or those from whom their title is deduced. Indeed, none but the government of the United States is made a party defendant in this case. Upon what proof, or on what surmise even, the district court could conclude that the lands had been granted or confirmed by the United States, this court cannot conjecture. Even if the opinion of the court could import intrinsically any proof upon this point, the inquiries would remain as to what portion of the lands had been granted; by whom, and to whom. Without information upon these heads, it seems difficult to imagine, if the fact of grants having been made were to be conceded, what should be the extent of the equivalent to be substituted for them. The mere assertion of the one or the other can invest no right, and impose no duty. It is too vague and indefinite to be comprehended, much less to be enforced with due regard to the rights of the parties to the cause.

It is therefore, for the several reasons before assigned, the opinion of this court that the decree of the district court be reversed, and the petition dismissed.

THE PROPELLER GENESEE CHIEF, her Tackle, Apparel, and Furniture, WILLIAM L. PIERCE, Master, ALEXANDER KELSEY, WILLIAM H. CHENEY, WILLIAM HUNTER, LANSING B. SWAN, GEORGE R. CLARK, and ELISHA B. STRONG, Appellants, v. HENRY FITZHUGH, DEWITT C. LITTLEJOHN, and JAMES PECK.

12 H. 443.

The admiralty jurisdiction granted to the district courts of the United States under the constitution, extends to the navigable lakes and rivers of the United States, without regard to the ebb and flow of the tides of the ocean.

The Propeller *Genesee Chief* v. *Fitzhugh*. 12 H.

Congress had power to pass the act of February 26, 1845, (5 Stats. at Large, 726,) not as regulations of commerce, but under the provision of the constitution that the judicial power of the United States shall extend to cases of admiralty and maritime jurisdiction, and as regulations of that jurisdiction.

If a steamer be wrongfully in a dangerous proximity to a sailing vessel, and there is immediate and pressing danger of a collision, and the master of the sailing vessel, previously in no fault, in the alarm of the moment, fails to give the most proper order, this does not exempt the steamer from damages for the collision which ensues.

If a collision occurs in the night between a steamer and a sailing vessel, and the steamer had not a proper look-out kept, this is *prima facie* evidence that the fault of the steamer occasioned the collision.

What is a proper look-out, explained.

APPEAL from the circuit court of the United States for the northern district of New York.

Mathews, for the appellants.

Grant and *Seward*, contra.

[*450] *TANEY, C. J., delivered the opinion of the court.

This is a case of collision on Lake Ontario. The libellants were the owners of the schooner *Cuba*, and the respondents and present appellants the master and owners of the propeller *Genesee Chief*. The libellants state that on the 6th of May, 1847, as *The Cuba* was on her voyage from Sandusky, in the State of Ohio, to Oswego, in the State of New York, *The Genesee Chief*, which was proceeding on a voyage up the lake, ran foul of her and damaged her so seriously that she shortly afterwards sunk, with her cargo on board; and they also allege that the collision was occasioned by the carelessness and mismanagement of the officers and crew of the propeller, without any fault of the officers or crew of *The Cuba*. The respondents deny that it was *occasioned by the fault of the steamboat, and impute it to the carelessness with which the schooner was managed.

The proceeding is *in rem*, and in substance as well as in form, a proceeding in admiralty. It was instituted under the act of February 26, 1845, 5 Stats. at Large, 726, extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same. The district court decreed in favor of the libellants, and the decision was affirmed in the circuit court, from which last mentioned decree this appeal has been taken.

Before, however, we can look into the merits of the dispute, there is a question of jurisdiction which meets us at the threshold. When the act of congress was passed, under which these proceedings were had, serious doubts were entertained of its constitutionality. The language and decision of this court, whenever a question of admi-

ralty jurisdiction had come before it, seemed to imply that under the constitution of the United States, the jurisdiction was confined to tide waters. Yet the conviction that this definition of admiralty powers was narrower than the constitution contemplated, has been growing stronger every day with the growing commerce on the lakes and navigable rivers of the western States. And the difficulties which the language and decisions of this court had thrown in the way, of extending it to these waters, have perhaps led to the inquiry whether the law in question could not be supported under the power granted to congress to regulate commerce. This proposition has been maintained in a recent work upon the jurisdiction, law, and practice of the courts of the United States in admiralty and maritime causes, which is entitled to much respect, and the same ground has been taken in the argument of the case before us.

The law, however, contains no regulations of commerce; nor any provision in relation to shipping and navigation on the lakes. It merely confers a new jurisdiction on the district courts; and this is its only object and purpose. It is entitled: "An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same;" and the enacting clause conforms to the title. It declares that these courts shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in or upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and territories, as was at the time of the passage of the law possessed and exercised by the district courts in cases of like steamboats and other vessels *employed in navigation and com- [* 452] merce on the high seas, or tide waters within the admiralty and maritime jurisdiction of the United States.

It is evident, therefore, from the title as well as the body of the law, that congress, in passing it, did not intend to exercise their power to regulate commerce; nor to derive their authority from that article of the constitution. And if the constitutionality of this law is supported as a regulation of commerce, we shall impute to the legislature the exercise of a power which it has not claimed under that clause of the constitution; and which we have no reason to suppose it deemed itself authorized to exercise.

Indeed, it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States a regulation of commerce. This law gives jurisdiction to a certain extent over commerce and navigation and

authorizes the court to expound the laws that regulate them. But the jurisdiction to administer the existing laws upon these subjects is certainly not a regulation within the meaning of the constitution. And this act of congress merely creates a tribunal to carry the laws into execution, but does not prescribe them.

Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the constitution by separate and distinct grants. The extent of the judicial power is carefully defined and limited, and congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial regulations. And the limits fixed by the constitution to the judicial authority of the courts of the United States, would form an insuperable objection to this law, if its validity depended upon the commercial power.

This power is as extensive upon land as upon water. The constitution makes no distinction in that respect. And if the admiralty jurisdiction, in matters of contract and tort which the courts of the United States may lawfully exercise on the high seas, can be extended to the lakes under the power to regulate commerce, it can with the same propriety and upon the same construction, be extended to contracts and torts on land when the commerce is between different States. And it may embrace also the vehicles and persons engaged in carrying it on. It would be in the power of congress to confer admiralty jurisdiction upon its courts, over the cars engaged in transporting passengers or merchandise from one State to another,

and over the persons engaged in conducting them, and deny [* 453] to the parties * the trial by jury. Now the judicial power in cases of admiralty and maritime jurisdiction, has never been supposed to extend to contracts made on land and to be executed on land. But if the power of regulating commerce can be made the foundation of jurisdiction in its courts, and a new and extended admiralty jurisdiction beyond its heretofore known and admitted limits, may be created on water under that authority, the same reason would justify the same exercise of power on land.

Besides, the jurisdiction established by this act of congress does not depend on the residence of the parties. And under the admiralty powers conferred on the district courts, they are authorized to proceed *in rem* or *in personam* in the cases mentioned in the law although the parties concerned are citizens of the same State. If the lakes and waters connecting them are within the admiralty and maritime jurisdiction, as conferred by the constitution, then undoubtedly this

authority may be lawfully exercised, because this jurisdiction depends upon the place and not upon the residence of the parties.

But if the admiralty jurisdiction is confined to tide water, the courts of the United States can exercise over the waters in question nothing more than ordinary jurisdiction in cases at common law and equity. And in cases of this description they have no jurisdiction, if the parties are citizens of the same State. This being an express limitation in the grant of judicial power, no act of congress can enlarge it. And if the validity of the act of 1845 depended upon the power to regulate commerce, it would be unconstitutional, and could confer no authority on the district courts.

If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the constitution was adopted.

If the meaning of these terms was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the *admiralty court to administer [*454] international law, and if the one cannot be established neither can the other.

Again. The Union is formed upon the basis of equal rights among all the States. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tide water rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams which flow through the western States. Certainly such was not the

intention of the framers of the constitution; and if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the great objects of the framers of the constitution: that is, a perfect equality in the rights and the privileges of the citizens of the different States; not only in the laws of the general government, but in the mode of administering them. That equality does not exist, if the commerce on the lakes and on the navigable waters of the west are denied the benefits of the same courts and the same jurisdiction for its protection which the constitution secures to the States bordering on the Atlantic.

The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the constitution was adopted, was confined to the ebb and flow of the tide.

Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor any thing in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it.

In England, undoubtedly the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any [* 455] place where a port could be established to carry *on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters.

At the time the constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old

thirteen States the far greater part of the navigable waters are tide waters. And in the States which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation. And, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide water. And that definition having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated, as cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably here as well as in England, tide water must be the limits of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters. It was under the influence of these precedents and this usage, that the case of *The Thomas Jefferson*, 10 Wheat. 428, was decided in this court; and the jurisdiction of the courts of admiralty of the United States declared to be limited to the ebb and flow of the tide. **The Steamboat Orleans v. Phœbus*, 11 Pet. [*456] 175, afterwards followed this case, merely as a point decided.

It is the decision in the case of *The Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day.

Moreover, the nature of the questions concerning the extent of the admiralty jurisdiction, which have arisen in this court, were not calculated to call its attention particularly to the one we are now considering. The point in dispute has generally been, whether the jurisdiction was not as limited in the United States as it was in England at the time the constitution was adopted. And if it was so limited, then it did not extend to contracts for maritime services when made on land; nor to torts and collisions on a tide water river, if they took place in the body of a country. The attention of the court, therefore, in former cases, has been generally strongly attracted to that question, and never, we believe, until recently, drawn to the one we are now discussing, except in the case of *The Thomas Jefferson*, afterwards followed in *The Steamboat Orleans v. Phœbus*, as already mentioned. For, with this exception, the cases always arose on contracts for services on tide water, or were upon libels for collisions or other torts committed within the ebb and flow of the tide. There was, therefore, no necessity for inquiring whether the jurisdiction extended further in a public navigable water. And following the English definition, tide was assumed and spoken of as its limit, although that particular question was not before the court.

The attention of the court was, however, drawn to this subject in the case of *Waring v. Clarke*, 5 How. 441, which was decided in 1848. The collision took place on the Mississippi River, near the bayou Goulah, and there was much doubt whether the tide flowed so high. There was a good deal of conflicting evidence. But the majority of the court thought there was sufficient proof of tide there, and consequently, it was not necessary to consider whether the admiralty power extended higher.

But that case showed the unreasonableness of giving a construction to the constitution which would measure the jurisdiction [*457] of the admiralty by the tide. For if such be the construction, then a line drawn across the River Mississippi would limit the jurisdiction, although there were ports of entry above it, and the water as deep and navigable, and the commerce as rich, and exposed to the same hazards and incidents, as the commerce below. The distinction would be purely artificial and arbitrary as well as unjust, and would make the constitution of the United States subject one part of a public river to the jurisdiction of a court of the United States, and deny it to another part equally public and but a few yards distant.

It is evident that a definition that would at this day limit public rivers in this country to tide water rivers, is utterly inadmissible. We have thousands of miles of public navigable water, including lakes

and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the constitution of the United States.

We are the more convinced of the correctness of the rule we have now laid down, because it is obviously the one adopted by congress in 1789, when the government went into operation. For the 9th section of the judiciary act of 1789,¹ by which the first courts of admiralty were established, declares that the district courts "shall have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas."

The jurisdiction is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable, it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the constitution.

It so happened that no seizure was made, and no case calling for the exercise of admiralty power arose for a long period of time, upon any navigable water where the tide did not ebb and flow. As we have before stated, there were no navigable waters in the United States upon which commerce, in the usual acceptation of the word, was carried on, except tide water, until the valley of the Mississippi was settled and cultivated, and steamboats invented, and no case therefore came before the court during the early period of the government that required it to determine whether this jurisdiction could be extended above tide. * It is perhaps to be regretted that such a case did not arise. For we are persuaded that if one had occurred and attracted the attention of the court to this point before the English definition had become the settled mode of describing the jurisdiction, and before the courts had been accustomed to adhere strictly to the English mode of pleading, in which the place is always averred to be within the ebb and flow of the tide, the definition in the act of 1789, which is so evidently the correct one, would have been adopted by the courts, and the difficulty which has now arisen would not have taken place.

¹ 1 *Stats. at Large*, 76.

This legislative definition, given at this early period of the government, is certainly entitled to great consideration. The same definition is in effect again recognized by congress by the passage of the act which we are now considering. We have, therefore, the opinion of the legislative department of the government, twice deliberately expressed upon the subject. These opinions, of course, are not binding on the judicial department, but they are always entitled to high respect. And in this instance we think they are founded in truth and reason; and that these laws are both constitutional, and ought, therefore, to be carried into execution. The jurisdiction under both laws is confined to vessels enrolled and licensed for the coasting trade; and the act of 1845 extends only to such vessels when they are engaged in commerce between different States or territories. It does not apply to vessels engaged in domestic commerce of a State; nor to vessels or boats not enrolled and licensed for the coasting trade under the authority of congress. And the state courts within the limits embraced by this law exercise a concurrent jurisdiction in all cases arising within their respective territories, as broadly and independently as it is exercised by the old thirteen States, (whose rivers are tide waters,) and where the admiralty jurisdiction has been in full force ever since the adoption of the constitution.

The case of *The Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it, notwithstanding the opinion we have expressed. For every one would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights, thus acquired, would not be disturbed. In such a case, *stare decisis* is the safe and established rule of judicial policy, and should always be adhered to. For if the law, as pronounced by the court, ought not to stand, it is in the power of the legislature to amend it, without impairing rights acquired under it. But the decision referred to has no relation to rights of property. It was a question [*459] of jurisdiction only, and the *judgment we now give can disturb no rights of property, nor interfere with any contracts heretofore made. The rights of property and of parties will be the same by whatever court the law is administered. And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it.

The principal objection made to the admiralty jurisdiction is the

want of the trial by jury. And it is this feature in the admiralty practice which made it the object of so much jealousy in England in the time of Lord Coke, and enabled him to succeed in his efforts to restrict it to very narrow limits. But experience in England has proved that a wider range of jurisdiction was necessary for the benefit of commerce and navigation; and that they needed courts acting more promptly than courts of common law, and not entangled with the niceties and strictness of common-law pleadings and proceedings. And during the reign of the present queen, the admiralty jurisdiction has been extended to maritime services and contracts and to torts in navigable waters, although the place where the service was performed or the contract made or the tort committed, was within the body of a county, and within the jurisdiction of the courts of common law. A concurrent jurisdiction is reserved to the last mentioned courts, if the party complaining chooses to select that mode of proceeding. But in the new and extended jurisdiction of the English admiralty, the old objection remains, and neither party is entitled to a trial by jury. The court in its discretion may send the question of fact to a jury, if it thinks proper to do so. But the party cannot demand it as a matter of right. Yet the English people have certainly lost nothing of their attachment to the trial by jury since the days of Lord Coke. And this recent and great enlargement of the admiralty power is strong proof that the want of it has been felt, and that experience has shown its necessity where the interests of an extensive commerce and navigation are concerned.

But the act of congress of which we are speaking, is free from the objection to which the English statute is liable. Like the English statute, it saves to the party a concurrent remedy at common law in any court of the United States or of a State which may be competent to give it. But it goes further. It secures to the parties the trial by jury as a matter of right in the admiralty courts. Either party may demand it. And it thus effectually removes the great and leading objection, always heretofore made to the admiralty jurisdiction.

The power of congress to change the mode of proceeding in this respect in its courts of admiralty, will, we suppose, hardly be questioned. The constitution declares that the judicial [* 460] power of the United States shall extend to "all cases of admiralty and maritime jurisdiction." But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by congress. But the extent of the power as well as the mode of proceeding in

which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of congress, except where that power is limited by the terms of the constitution, or by necessary implication from its language. In admiralty and maritime cases, there is no such limitation as to the mode of proceeding, and congress may therefore, in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice. And in the proceedings under the act of 1845, the right to a trial by jury is undoubtedly secured to either party if he thinks proper to demand it.

In the case before us, no jury was required by the libellants or respondents, and the questions of fact as well as of law were therefore decided by the court.

This brings us to the evidence in the case. And it remains to inquire whether the collision in question was the result of inevitable accident, and if not, by whose fault it happened.

Many witnesses, it appears, were examined. And, as almost invariably happens in cases of this kind, there is a great deal of contradictory testimony, — the men belonging to one boat differing, for the most part, from those in the other. It has been examined with great care in the argument at the bar, and fully discussed, and we do not deem it necessary, in this opinion, to go over the whole ground, and compare the relative credit of the witnesses, or the weight and authority to which they are severally entitled.

There are some leading facts in the case which, upon the whole testimony, are free from doubt. The collision took place in the open lake. It was a starlight night, and although there was a haze near the surface of the lake, it was not sufficient to conceal The Cuba from those on board of the propeller. She had a light on her bowsprit, and was seen from the steamboat when she was four or five miles off. And the helmsman of the propeller states that it was at no time so thick as to prevent him from seeing the light at the distance of half a mile. The wind was light, moving The Cuba, which was heavily laden, not more than two or three miles an hour. The lake was smooth. The steamboat had the entire command [*461] of her course and a *wide water, by which she might have passed The Cuba on either side, and at a safe distance. She was going at the rate of eight miles an hour. And if proper care had been taken on board The Genesee Chief, after the schooner was first seen, it would seem to be almost impossible that a collision could have happened with a vessel moving so slowly and sluggishly through the water, even if she was carelessly or injudiciously man-

aged. There was no necessity for passing so near to her as to create the hazard. The steamboat could choose its own distance, and might have approached her slowly and cautiously, if the intervening mist obscured the light after she was first discovered, or occasionally concealed it.

But there is no evidence of any fault on the part of The Cuba. She changed her course, it is true, when she was some miles distant from the propeller. But a vessel close hauled with a baffling wind, cannot always choose her course, but may be compelled to change it by a slight change in the wind. And the captain states that the course was altered because he observed her sails to be shaking, and the change was necessary to enable her to preserve her headway. And this change was made when she was distant some miles, and there was ample time for those on board the propeller to observe it, and ample room to guard against it. And the captain and crew of The Cuba appear to have been watchful and attentive from the time the propeller was discovered. Nor do we deem it material to inquire whether the order of the captain at the moment of collision was judicious or not. He saw the steamboat coming directly upon him; her speed not diminished; nor any measures taken to avoid a collision. And if, in the excitement and alarm of the moment, a different order might have been more fortunate, it was the fault of the propeller to have placed him in a situation where there was no time for thought, and she is responsible for the consequences. She had the power to have passed at a safer distance, and had no right to place the schooner in such jeopardy that the error of a moment might cause her destruction, and endanger the lives of those on board. And if an error was committed under such circumstances, it was not a fault.

As regards the strength and direction of the wind, the testimony of those on board of the schooner is entitled to much more weight than the witnesses who were on board the steamboat. The movements of the latter were independent of the wind. There was nothing to attract the attention of the captain or crew to the light land breeze that was then blowing. But the movements of The Cuba depended upon it, and the attention of those on board of her was necessarily drawn to it every moment. And while we see nothing to censure in the conduct of the *schooner, there is conclusive [*462] evidence of great carelessness on board of The Genesee Chief.

It is possible that their conduct may in some measure be accounted for by the fact that the captain and helmsman made up their minds, when the light in The Cuba was first seen, that she was bound up

the lake, and they would seem to have acted upon that opinion up to the moment of the collision. They may have believed that as they were running on the same course, and as the helmsman supposed with a four mile wind, there could be no danger of a sudden encounter, and that when they neared her, there would be time enough to change the course of the steamboat, and pass at a safe distance. It would seem difficult otherwise to account for the careless manner in which the light of *The Cuba* was observed even by the helmsman, for he says he saw it at intervals as the vessels were approaching each other, and lost sight of it for three or four minutes immediately before they came together. Now the light was seen at the distance of four or five miles in the first instance, and he states, in his subsequent testimony, that there was not haze enough on the lake to prevent him from seeing it at the distance of half a mile. There was, therefore, nothing to prevent him, when the vessels were within that distance, from seeing it continually if he looked for it, unless he was prevented by the position in which he placed himself in the wheel-house. And if the light was hidden by the haze, still, as he knew that a vessel was ahead, and so near, nothing could excuse the rashness of continuing the steamboat at her full speed, if he supposed the schooner was meeting him, and not running on the same course.

If this mistake continued until the collision was about to take place, it would be the strongest proof of negligence, as there was abundance of time to have discovered their error. But however this may be, it is evident that there was not a proper look-out on board of the propeller. By a proper look-out, we do not mean merely persons on deck, who look at the light; but some one in a favorable position to see, stationed near enough to the helmsman to communicate with him, and to receive communications from him, and exclusively employed in watching the movements of vessels which they are meeting or about to pass. And it appears that the helmsman saw no one, after he and the captain first observed the light of *The Cuba*, until the vessels met. The captain had not observed her near approach, for when the collision happened, he ran to the wheel-house to inquire what was the matter. And when the steersman, by his own imperfect observation, saw that the danger was imminent, and it was absolutely necessary that the speed of the boat [*463] should be instantly checked, nobody else appears to have seen it, and no one was near him, and he was forced to leave the wheel at the most critical moment in order to ring the bell to reverse the engine. The fact that there was no one near him to whom he could call, and no one but himself that saw the danger, is

conclusive evidence of the carelessness with which The Genesee Chief was proceeding. She was running at her usual speed, although the captain knew, half an hour before, that there was a vessel in his path, and caution therefore necessary; and the more necessary if the haze obscured the light of the schooner, as some of the witnesses represent.

It is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant look-out besides the helmsman. It is impossible for him to steer the vessel and keep the proper watch in his wheel-house. His position is unfavorable to it, and he cannot safely leave the wheel to give notice when it becomes necessary to check suddenly the speed of the boat. And whenever a collision happens with a sailing vessel, and it appears that there was no other look-out on board the steamboat but the helmsman, or that such look-out was not stationed in a proper place, or not actually and vigilantly employed in his duty, it must be regarded as *prima facie* evidence that it was occasioned by her fault. She has command of her own course and her own speed; and it is her duty to pass the approaching vessel at such a distance as to avoid all danger where she has room; and if the water is narrow, her speed should be checked so as to accomplish the same purpose. In the present case, every proper precaution seems to have been neglected. No pains were taken to ascertain the course of The Cuba; there was no one upon the look-out but the helmsman, and that duty negligently performed by him; and in a starlight night, with four or five miles of deep water on the one side, and the open lake on the other, with a light breeze and smooth surface, she run into and sunk a vessel that had been seen half an hour before, at a distance of four or five miles, and which was sailing at the rate of not more than two or three miles an hour, and doing every thing in her power to warn those on board the steamboat of her position and her danger. We are satisfied, from the whole testimony, that there was great and inexcusable carelessness on the part of the propeller, and that the damages are not higher than the loss requires.

The decree of the circuit court must, therefore, be affirmed with costs.

DANIEL J. From so much of the opinion just announced as claims jurisdiction *in this case, and especially from the [*464] ground (for the first time assumed in this court) as the principal foundation of that jurisdiction, I find myself constrained to declare my dissent. It is not my purpose here to reiterate my views of the extent of the admiralty powers vested by the constitution in

the courts of the United States, nor of the sources from which those powers were conceived by the framers of the constitution to have been derived. Those views have, on former occasions, been fully developed, particularly in the case of *The New Jersey Steam Navigation Co. v. The Merchants Bank*, in 6 How. 344, in my concurrence with the opinion of the late Justice Woodbury, in the case of *Waring v. Clark*, 5 How. 441, and in my opinion in the case of *Newton v. Stebbins*, 10 How. 586.

The decisions of this tribunal heretofore made, will, upon a correct examination of them, be found to rest the admiralty powers of the federal courts, not solely upon the known and established principles and limitations of the powers and jurisdiction of the admiralty in England, principles and limitations settled in that country at the time of the adoption of the federal constitution, and rigidly adhered to there until altered by some recent legislative provisions; but they have professed to place those powers upon some supposed enlargement of the admiralty jurisdiction, said to have sprung from the practice of the vice-admiralty courts in the British colonies; a practice which, whilst it has been alleged as a justification of each instance in support of which it has been invoked, no case, no investigation has ever been able to place upon any clear and indisputable authority. It is against this undefined and undefinable warrant for the exercise of power, that the objections, urged by me on former occasions, have been levelled. Moreover, it has always seemed to me to imply a palpable contradiction, that there should be ascribed (and that by mere implication) to the vice-admiralty courts, (the creatures of the high admiralty,) powers which the latter confessedly never possessed. But the doctrine at present promulgated by this court, is based upon assumptions still more irregular in my view, still more dangerous than that above adverted to, because it claims for this court, wholly irrespective either of the constitution or the legislation of congress, powers to be assumed and carried into execution by some rule which in the judgment of this court is to be applied according to its own opinions of convenience or necessity. Thus, it is admitted that, by the decisions in England, the jurisdiction of the admiralty did not reach *infra corpus comitatus*, and was limited to the ebb and flow of the tide; and it is admitted that, by the previous decisions of this court, the like limitations were imposed on the jurisdiction of the admiralty in this country; and even this limitation, imposed

[*465] *by former decisions of this tribunal, it is obvious, allowed of some encroachment upon the common-law jurisdiction, in so far as the ebb and flow of the tide might bring the asserted power of the court *infra fauces terrae*, or *infra corpus comitatus*.

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But even this encroachment is not sufficient to satisfy the aspirations of the jurisdiction, now for the first time asserted; for now it is insisted that any waters, however they may be within the body of a State or county, are the peculiar province of the admiralty power; and although it is admitted that the power was once clearly understood as being limited to the ebb and flow of the tide, yet now, without there having been ingrafted any new provision on the constitution, without the alteration of one letter of that instrument, designed to be the charter of all federal power, the jurisdiction of the admiralty is to be measured by miles, and by the extent of territory which may have been subsequently acquired; a much less natural standard, surely, than the nature and character of the element to which the admiralty is peculiarly adapted, and to which it owes its origin; that the constitution may, nay must be altered by the same process, and must be enlarged not by amendment in the modes provided, but according to the opinions of the judiciary, entertained upon their views of expediency and necessity. My opinions may be deemed to be contracted and antiquated, unsuited to the day in which we live; but they are founded upon deliberate conviction as to the nature and objects of limited government, and by myself at least cannot be disregarded; and I have at least the consolation—no small one it must be admitted—of the support of Marshall, Kent, and Story in any error I may have committed. I cannot construe the constitution either by mere geographical considerations; cannot stretch nor contract it in order to adapt it to such limits, but must interpret it by my solemn convictions of the meaning of its terms, and by what is believed to have been the understanding of those by whom it has been formed. In the view taken by the court of the evidence in this case, I entirely concur.

12 H. 466; 18 H. 228; 20 H. 296; 21 H. 244, 372; 22 H. 461; 23 H. 287; 1 B. 574;
2 Wal. 287; 4 Wal. 555; 7 Wal. 196, 272, 624.

RALPH S. and JOHN FRETZ, Appellants, v. JOHN C. BULL, WILLIAM J. MCCLURE, and THOMAS S. FOREMAN, Partners, trading under the Name and Style of J. C. BULL AND Co., for the Use of the Firemen's Insurance Company of Louisville.

12 H. 466.

The admiralty jurisdiction of the courts of the United States extends to collisions on the River Mississippi above the ebb and flow of the tide.

Though the owner of a boat and cargo, destroyed by a collision, has received, from the underwriter on the cargo, the amount of a part of his loss, he may maintain a libel, and it is not fatal to his suit that the libel states it to be in behalf of the underwriter.

If a steamer is wrongfully in dangerous proximity to a flatboat, and the proximate cause of a collision is an unexpected sheer given to the flatboat by an eddy, the steamer is in fault, and must bear the whole loss.

APPEAL from the circuit court of the United States for the eastern district of Louisiana.

The facts are stated in the opinion of the court.

Coxe, for the appellants.

Clay, contra.

[* 468] * WAYNE, J., delivered the opinion of the court.

Two objections were urged in the argument of this cause by the appellants' counsel, against this court giving a decision upon its merits.

The one, that the court had not jurisdiction on account of the locality of the collision, it being beyond tidewater; and the other, that the libellants could not prosecute this suit for the benefit of others, as the libellants have no interest in it.

The first may be disposed of, because the court, at this term, has decided, in the case of *The Genesee Chief v. Fitzhugh et al.* 12 How. 443, that the constitutional jurisdiction of the United States in admiralty was not limited by tidewater, but was extended to the lakes and navigable rivers of the United States.

The other objection is not sustained by the proofs in the cause. Mr. Atwood, p. 39 of the Record, states what was the amount of insurance which was paid upon the cargo, by the Firemen's Insurance Company of Louisville, and that nothing was paid to the libellants, Bull and Co., for the loss of the boat.

In admiralty, the party entitled to relief, should always be made libellant; and the practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred, only obtains in particular cases. But all persons entitled on the same state of facts to participate in the same relief, may join as libellants, whether the suit be *in personam* or *in rem*. Benedict, 211, § 380.

Mr. Atwood, in his testimony, says, how Bull and Co. became united with the insurance company in this suit, though it is not stated in the libel with the precise formality it should have been, yet it appears sufficiently plain in other parts of the libel, and from the proofs in the cause, that the parties named in the libel have respectively an interest, which is covered by the principle just stated, that the same state of facts which will give relief to one will permit others to be joined as libellants. It is no substantial ob-

[* 469] jection, then, that the suit has been brought * in the name of Bull and Co., for the use of the Firemen's Insurance Com-

pany. The insurance, in this instance, was upon the cargo of boat No. 2, and not upon the boat. The cargo, however, was not fully insured. The insurance company, upon being informed of the loss of it from a collision with The Memphis, paid their policy upon it, and that placed them in a condition to bring this suit for its recovery, if it could be ascertained that the collision was produced by the fault of those who were in charge of the steamer belonging to the appellants.

We will now inquire from what cause the collision happened, or who was in the fault.

In the second article, we have a description of its locality. It was at a point in the Mississippi River opposite Prophet's Island, in the State of Louisiana, and took place on the 11th April, 1847, on a clear day, between the hours of nine and ten o'clock, in the forenoon, whilst the flatboat, No. 2, was going down stream in the usual and proper channel. It seems, that she was drawn in towards the shore by an eddy, and that whilst there, the steamer Memphis (also descending the river) and the flatboat came in contact with each other, from which the flatboat was capsized and sunk in less than four minutes, losing her whole cargo, excepting sixteen barrels and one keg of lard. The allegation is, that the steamer, with proper care and skill, might with great ease have been kept clear of said flatboat, and that the flatboat could not possibly get out of the way of the steamboat, but was run against by the steamer with great force and violence, striking her on her starboard quarter and causing her to fill rapidly. The answer of the respondents to this allegation is, that the steamer was carefully going down the Mississippi, being at the time in the proper place for a descending boat, and that the officers on board of said steamboat observed two flatboats in the eddies, on both sides of the river, one in the eddy on the right side of the river, the other in that on the left, the latter being the flatboat, No. 2. It is further stated that when the flatboats were discovered, there was ample space for the steamboat to pass safely between them. The flatboat on the right-hand side of the river was nearest the steamboat, and was first passed. It is also stated, that in order to leave ample room for passing in safety flatboat No. 2, which was on the left side, that The Memphis was steered as closely to the first flatboat as it was prudent or safe to go; that after that boat had been safely passed, the flatboat, No. 2, appeared to be some two hundred yards in the eddy from the course of the steamer, the captain of her requesting that a Louisville paper might be thrown into the river for him, stating that he would send his skiff out for it. Up to this time there was not the slightest apprehension of a collision. The [* 470]

captain of *The Memphis*, not liking the position of the flatboat, she being at the time off to the left of his boat, with her bow nearly at right angles to his boat, requested the persons on the boat to throw down her stern. The captain of the flatboat seized the helm and endeavored to do so, but could not succeed. A moment before this, no one could have supposed a collision possible, but just about the time the bow of *The Memphis* passed the flatboat, she being then a considerable distance to the left of the course of *The Memphis*, a sudden change in the current of the eddy, or some other cause unknown to these respondents, threw the said flatboat against the larboard wheel-house of *The Memphis*, nearly bow foremost, which started one of the planks of her bow, causing her soon to fill with water and sink. That previous to, and at the time of the collision, *The Memphis* was running in the current of the river, between the two eddies.

From these allegations of the appellants and respondents, substantially agreeing with each other, as to the eddies, the locality of the collision, and the relative positions of the boats to each other at that moment, it would be difficult to determine, by the fault of which of them the disaster was occasioned. But from the antecedent navigation of *The Memphis*, from the point where the flatboats were first observed, whether it shall be taken from the narrative of the respondent just recited, or from the evidence in the case, it cannot be doubted that the collision was produced by the carelessness or ignorance or disregard of her pilot of the consequences which those eddies might produce in the positions in which *The Memphis* and flatboats then were. It is not denied by the respondents, and it is asserted by the libellants, that the flatboat was, from the time *The Memphis* first saw her, until she was sunk, in the proper channel of downward navigation, floated onward only by the current. The captain of *The Memphis*, in his downward course, was the first to discover the danger resulting from the position in which his vessel had been placed relatively to the flatboat. He says, he did not like it, and requested those on board the flatboat to throw down her stern. He admits, that the captain of the flatboat endeavored to do so, but could not succeed. He had approached the flatboat, without any change in the position of the flatboat up to that moment. Now, if according to his own declaration, the collision occurred but a moment after, before he can be excused for his near approach to the flatboat, he must show that there was not water-room, and of sufficient depth, to have run *The Memphis* further off than he did, and that there was not, on either side of the flatboat, a sufficient width of water for him to have passed the flatboat at a distance greater than the

length of The *Memphis; for it is plain, if that had been [*471] done, whether the eddy turned the flatboat or not, that the two boats could not have come into collision. The evidence on the part of the respondents, confirms this view of the case; for Galusha says, that at the time of the collision, there was room enough for The Memphis to pass without interfering with the flatboat at all; and Thomas testifies, that the flatboat was floating with the current, and the steamboat running with the stream, and though that at the place of accident, there was an eddy on both sides of the river, that the river was very high and broad, and The Memphis might have passed on either side, and thereby prevented the accident. It is further stated by this witness, that The Memphis was coming towards the flatboat, and if we had pulled from her we should have got into the eddy towards her, and she would have run over us; we did every thing we could to prevent said accident, and it was not caused by the carelessness or want of skill of the crew of the flatboat. Yourd, another witness, confirms this statement, and that The Memphis had "a plenty of room to avoid her." Henry Moore, another witness says, that the accident was caused by the fault of the pilot or crew of the steamboat Memphis; that it occurred in daylight, when there was no fog on the river and no wind; that on the left side of the steamboat there were three hundred yards of water; and on the right side one hundred yards; that the steamboat might have passed on either side with perfect safety to herself and the flatboat, as there were neither bars nor snags in that part of the river; but that instead of passing around, she undertook to run between the flatboat and a hay boat that was floating between us and the right-hand shore, and struck our boat as he has stated. The respondents' witness, Bentley, confirms the statement of the last witness, that the steamer run between the two boats, running as near to the boat on the right, in order to leave as much room for the one on the left, as possible; and that he did not, after he had passed the boat on the right, apprehend there was any danger of collision with the boat on the left; that The Memphis kept a straight course down the current of the river, and did not suppose, when The Memphis passed the first flatboat, that he would run within a hundred yards of the boat, No. 2. He further states, that the flatboat, No. 2, did not change her relative position to the course The Memphis was running, but it was caused by the eddy forcing out the flatboat into the current of the river; that he, as the pilot, ran The Memphis in such a manner as he thought would prevent a collision. He thinks The Memphis was fifty yards from the flatboat, when the bow of The Memphis passed her; at that time witness was running, quartering into the bend on the

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[*472] *left. About that time, he was apprehensive of a collision, and that it was caused by the approach of the flatboat. But this witness says, that the river, at the place of collision, was from three quarters to a mile wide. Now with this fact, stated by himself, why was it necessary to run The Memphis on such a course as that such a collision should have happened? Or why was she not run at such a distance as that it could not have occurred? Added to this, this witness knew the force of the eddies, and should have guarded cautiously against their effect.

This is a cause of collision happening in broad daylight, after the steamer had observed the flatboat for more than the distance of half a mile. The evidence shows, that the steamer could have been differently navigated from the manner in which she was, and that the course she was run, though in the judgment of the pilot was the best under the circumstances, yet that it was a course which caused the collision, and that another might have been taken by which there would have been no possibility of a collision.

The judgment of the circuit court is affirmed.

DANIEL, J., dissented from the decision in this case, on the ground of the want of jurisdiction in the admiralty courts of the United States, in cases like the present.

20 H. 296; 1 Wal. 43; 4 Wal. 555.

MYRA CLARK GAINES, Appellant, v. RICHARD RELF, and BEVERLY CHEW, Executors of DANIEL CLARK and others.

12 H. 472.

Bill in equity to establish the title of Myra Clark Gaines to one half the estate of the late Daniel Clark, as his legitimate daughter, and to have an account thereof from his executors and others. *Held*, that the legitimacy of the complainant was not made out, and the bill was dismissed.

The marriage of the complainant's mother to D. being admitted, his confession that he had a lawful wife living at the time of such marriage, is not admissible in evidence as against third persons.

The certificate of a clergyman, made sixteen years after the alleged act, that he had married the persons named therein, held not to be evidence.

A record of a county court in New Orleans, containing no libel, or petition, and not showing upon its face that it was a proceeding in rem, held inadmissible in evidence as against third persons.

A decree of this court, made in a suit which is proved not to have been a real controversy, is not admissible in evidence against third persons.

Where the complainant had put in secondary evidence that one D. had been convicted of bigamy by the ecclesiastical court in New Orleans, while under the dominion of Spain, and that, on search, the record thereof could not be found, the respondent may introduce a record of such a prosecution in which D. was acquitted, coming from the custody of the proper officers, the signatures of the Spanish officers to the authentication of the record

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being proved, and it being shown that at the time in question those persons held those offices.

A deposition of the complainant's mother, under whom she claims title, made in another proceeding, is evidence against the complainant.

A letter from a husband to a wife, is evidence in a suit *inter alios* of the state of his feelings towards her when written, and also of his being at the place where it purports to have been written, at the time of its date.

THE case, according to the views taken of it by a majority of the court, and much of the evidence, are stated in the opinion of the court.

Johnson and John A. Campbell, for the appellant.

Green Duncan and Webster, contra.

* CATRON, J., delivered the opinion of the court. [* 505]

This cause comes here by appeal from the decree of the circuit court of the eastern district of Louisiana, where the bill was dismissed.

The complainant sues as the only legitimate child of the late Daniel Clark, who died in the city of New Orleans the 13th of August, 1813. No account is prayed against Daniel Clark's executors; but the complainant seeks to recover the property sold by them, consisting of lands and slaves, on the ground that her father could not deprive her, as his legitimate child, of more than one fifth part of his estate by a last will, according to the laws of Louisiana as they stood in 1813. And she maintains that the sales made by Chew and Relf, were made without any orders of court to authorize them, and that therefore they are void; the laws of Louisiana requiring such orders before a valid sale could be made.

The respondents claim under a will made by Daniel Clark in 1811, by which he devised all his property, real and personal, to his mother, Mary Clark, and appointed Richard Relf and Beverly Chew, his executors; and to whom Mary Clark made a power to sell Daniel Clark's estate for the purpose of raising money to pay his debts. Chew and Relf, acting as executors of Daniel Clark, and also as attorneys of Mary Clark, did sell the property in controversy for the purpose of paying the debts of the *testator. To meet this [* 506] claim of title, the complainant insists, 1. That the sales made by Chew and Relf, as executors, were made without orders from the court of probate to authorize them, and are void. 2. That Mary Clark had not accepted in legal form, the bequest of her son when she conveyed by her attorneys; and that, therefore, her conveyances cannot be relied on by her vendees to support the plea of innocent purchaser.

On the 10th day of June, 1844, the mother of the complainant, styling herself Madame Marie Zulime Carrière, and widow of the late Daniel Clark, by her notarial act, made in the city of New Orleans, accepted, without benefit of inventory, the community of acquests and gains of one moiety, which it is alleged existed between her and her late husband, Daniel Clark, according to the laws in such cases provided. And on the 2d of July, 1844, the then complainants, Gaines and wife, among other amendments to their bill, filed the following: "Your oratrix alleges that she is entitled to the one moiety of the estate of which the said Daniel Clark died possessed, by reason of a conveyance thereof made to her by M. Z. Gardette, the widow of the said Clark, and the mother of your oratrix, on the 7th day of May, 1836, and which is hereunto annexed, marked A B, and prayed to be taken as part hereof; and the mother of your oratrix did thereafter, on the 20th June, 1844, further convey to her all her interest in said estate, as appears by her act, a copy of which is herewith exhibited, marked C; the whole of said estate having been acquired during the coverture of said Clark and wife."

The exhibits in these particulars correspond to the allegations. It follows, therefore, that the complainant claims one half of Daniel Clark's estate by a conveyance from her mother.

The first and most important of the issues presented is that of the legitimacy of the complainant. It is raised, by the following pleadings:—

She alleges that her father, Daniel Clark, was married to Zulime Née Carrière, in the city of Philadelphia, in the year 1802 or 1803; and that she is the legitimate and the only legitimate offspring of that marriage.

The defendants deny that Daniel Clark was married to said Zulime at the time and place alleged, or at any other time or place. And they further aver, that at the time said marriage is alleged to have taken place, the said Zulime was the lawful wife of one Jerome Desgrange.

If the mother of the complainant was the lawful wife of Jerome Desgrange at the time said Zulime is alleged to have intermarried with Daniel Clark, then the marriage with Clark is merely
 * 507] void; and it is immaterial whether it did or did not * take place. And the first question we propose to examine is, as to the fact, whether said Zulime was Desgrange's lawful wife in 1802 or 1803.

A formal record of the marriage between Desgrange and Marie Julia Carrière, obtained from the cathedral Catholic church at New Orleans, is before us. That it is a true record of said marriage is

not controverted. Marie Julia is designated Zulime, by a *soubriquet* or nickname, which is proved to have been a common custom in Louisiana at that time. The marriage was solemnized in due form on the 2d day of December, 1794. This is admitted on part of the complainant. The parties cohabited together as man and wife for seven or eight years. This is also conceded by both sides. To rebut and overcome the established fact of this marriage, it is alleged that previous to Desgrange's marriage with Zulime, he had lawfully married another woman, who was living when he married Zulime, and was still his wife; and that, therefore, the second marriage was void. And this issue we are called on to try.

The marriage with Desgrange having been proved, it was established as *prima facie* true, that Zulime was not the lawful wife of Clark, and the *onus* of proving that Desgrange had a former wife living when he married Zulime, was imposed on the complainant; she was bound to prove the affirmative fact that Desgrange committed bigamy. To establish such previous marriage and the consequent bigamy by marrying a second time, much evidence was introduced and relied on by the complainant. The first witness whose testimony will be referred to was Madame Despau, sister of Zulime. Her testimony has been taken three times; first in 1839, then in 1845, and again in 1849.

In 1839 she says: "I was well acquainted with the late Daniel Clark, of New Orleans. He was married in Philadelphia in 1803, by a Catholic priest. I was present at this marriage. One child was born of that marriage, to wit: Myra Clark, who married William Wallace Whitney. I was present at her birth, and knew that Mr. Clark claimed and acknowledged her to be his child. She was born in 1806. I neither knew nor had any reason to believe, that any other child, besides Myra, was born of that marriage. The circumstances of her marriage with Daniel Clark were these: Several years after her marriage with Desgrange, she heard he had a living wife our family charged him with the crime of bigamy in marrying said Zulime; he at first denied it, but afterwards admitted it, and fled from the country. These circumstances became public, and Mr. Clark made proposals of marriage to my sister, with the knowledge of all our family. It was considered essential first to obtain * record-proof of Desgrange having a living wife at the [* 508] time he married my sister; to obtain which, from the records of the Catholic church in New York, (where Mr. Desgrange's prior marriage was celebrated,) we sailed for that city. On our arrival there, we found that the registry of marriages had been destroyed. Mr. Clark arrived after us. We heard that a Mr. Gardette, then liv-

ing in Philadelphia, was one of the witnesses to Mr. Desgrange's prior marriage. We proceeded to that city, and found Mr. Gardette. He answered, that he was present at said prior marriage of Desgrange, and that he afterwards knew Desgrange and his wife by this marriage; that his wife had sailed for France. Mr. Clark then said: 'You have no reason longer to refuse being married to me; it will, however, be necessary to keep our marriage secret till I have obtained judicial proof of the nullity of your and Desgrange's marriage.' They, the said Clark and the said Zulime, were then married. Soon afterwards, our sister, Madame Caillavet, wrote to us from New Orleans that Desgrange's wife, whom he had married prior to marrying said Zulime, had arrived at New Orleans. We hastened our return to New Orleans. He was prosecuted for bigamy; Father Antoine, of the Catholic church, taking part in the proceedings against Desgrange. Mr. Desgrange was condemned for bigamy in marrying the said Zulime, and was cast into prison; from which he secretly escaped by connivance, and was taken down the Mississippi River by Mr. LeBreton D'Orgenois, where he got into a vessel, escaped from the country, and, according to the best of my knowledge and belief, never afterwards returned to Louisiana. This happened in 1803, not a great while before the close of the Spanish government in Louisiana. Mr. Clark told us that before he could promulgate his marriage with my sister, it would be necessary that there should be brought by her an action against the name of Desgrange. The anticipated change of government created delay; but at length, in 1806, Mr. James Brown and Eligius Fromentin, as the counsel of my sister, brought suit against the name of Desgrange, in the city court, I think, of New Orleans. The grounds of said suit were, that Desgrange had imposed himself upon her at a time when he had a living lawful wife. Judgment in said suit was rendered against said Desgrange. Mr. Clark still continued to defer promulgating his marriage with my sister, which very much fretted and irritated her feelings. Mr. Clark became a member of the United States congress, in 1806. Whilst he was in congress, my sister heard he was courting Miss C., of Baltimore. She was much distressed, though she could not believe the report, knowing herself to be his wife. Still, his strange conduct in deferring to promulgate [* 509] his marriage with her had *alarmed her. She and I sailed for Philadelphia to get proof of his marriage with my sister. We could find no record, and were told that the priest, who married her and Mr. Clark, had gone to Ireland. My sister then sent for Daniel W. Coxe; mentioned to him the rumor; he answered that he knew it to be true that he (Clark) was engaged to her, (Miss C.)

My sister replied that it could not be so. He then told her that she would not be able to establish her marriage with Clark if he were disposed to contest it. He advised her to take counsel, and said he would send one. A Mr. Smyth came and told my sister that she could not legally establish her marriage with Clark, and pretended to read to her a letter in English, (a language then unknown to my sister,) from Mr. Clark to Mr. Coxe, stating he was about to marry Miss C. In consequence of this information, my sister Zulime came to the resolution of having no further connection or intercourse with Mr. Clark, and soon afterwards married Mr. Gardette, of Philadelphia." The witness further states that she became acquainted with Desgrange in 1793. He was a nobleman by birth, and married Zulime when she was thirteen years old. Zulime had two children by him, a boy and a girl; the boy died, the girl is living, (1839;) her name is Caroline, and married to Dr. Barnes. Witness was present at the birth of these children. The marriage of Zulime was a private one. Besides the witness, Mr. Dorsier, of New Orleans, and an Irish gentleman, a friend of Mr. Clark, from New York, were present at the marriage. A Catholic priest performed the ceremony.

In regard to the children, born of the marriage of Zulime and Desgrange, this witness further states in another deposition, that before the detection of Desgrange's bigamy, said Zulime had a son, who died, and a daughter called Caroline, which bore his name. Since the death of Mr. Daniel Clark, Mr. Daniel W. Coxe and Mr. Hulings, of Philadelphia, gave her the name of Caroline Clark, and took her to Mr. Clark's mother, and introduced her as the daughter of her son. She of course believed their story, which induced her in her will to leave a portion of her property to Caroline. Caroline was born in 1801.

I never heard Mr. Clark acknowledge his having any natural children; but have only heard him acknowledge one child, and that a lawful one, to wit, said Myra.

Her other depositions substantially correspond with the foregoing statement, so far as they bear on the question of Desgrange's bigamy.

The next most important witness is Madame Caillavet, another sister of Zulime. She was also three times examined. Her first deposition was taken at New Orleans, in May, 1835, in which she states: That sometime after the marriage of her sister * with Mr. Desgrange, her sister discovered that Mr. Des- [* 510] grange had been previously married; that in order to ascertain this fact, she went to Philadelphia, in the absence of her husband, who was in France; that whilst at Philadelphia, Desgrange

returned from France to New Orleans, and at the same time, or a very short time after, his first wife made her appearance in New Orleans. Upon this, witness immediately apprised her sister of this fact, and she returned immediately to New Orleans. On the arrival of the said first wife of Desgrange, she complained to the governor, who caused Desgrange to be arrested; (it was under the Spanish government;) after some time, he obtained his release and left the country. Before his departure, he confessed that he had been previously married. Witness understood afterwards from her sister by letters which she received from her secretly, that she was married with Mr. Daniel Clark; the preliminaries of the contemplated marriage were settled by the husband of witness, at his house in the year 1802 or 1803, in the presence of witness.

In the next deposition she states:—

“I have already stated all I knew about Mr. Clark’s marriage with Zulime, and of her marriage with Mr. Desgrange. By this marriage, she had two children, a boy and a girl; the boy is dead, the girl is still living; her name is Caroline, and is married to Dr. Barnes.”

The second and third depositions of Madame Caillavet correspond, but as the third one is more full, it is given. In this one she states as follows:—

“I did reside in the city of New Orleans, about the year 1800, and for many years previous; my residence continued there until I went to France, about the year 1807.

“I was acquainted with Daniel Clark, late of the city of New Orleans, deceased; my acquaintance with him commenced about the year 1797; my intimacy with him, growing out of his marriage with my sister, continued during my residence in New Orleans.

“I was not present at the marriage of Zulime Née Carrière (who is my sister) with Mr. Clark; but it is within my knowledge, both from information derived from my sisters at the time, and from the statements of Mr. Clark, made to me during his lifetime, that a marriage was solemnized between them. It is to my personal knowledge that Mr. Clark, about the year 1802 or 3, made proposals of marriage with my sister Zulime, with the knowledge of all our family. These proposals were discussed, and the preliminaries of the marriage arranged by my husband, at his house, in my presence. [*511] But my *sister, having been previously married to one Jerome Desgrange, who was found to have had a lawful wife living, at the time of his (Desgrange’s) marriage with her, the marriage with Mr. Clark could not take place until proofs of the invalidity of her marriage with Desgrange were obtained. To procure these proofs from public records, my sister Zulime, and Madame Des-

pau, went to the north of the United States, where Desgrange's prior marriage was said to have taken place. While there, my sister Zulime wrote to me that she and Mr. Clark were married. There was born of this marriage one, and only one child, a female, named Myra, who was put by Mr. Clark, while an infant, under the charge of Mrs. Samuel B. Davis, in whose family she was brought up and educated. Having suffered from hired nurses, she was nursed, through kindness, for some time after her birth, by Mrs. Harriet Harper, wife of William Harper, the nephew of Col. Samuel B. Davis. Mr. Clark stated to me, frequently, that Myra was his lawful and only child. This child is the same person who was married to William Wallace Whitney; and who is now the wife of General Edmund P. Gaines, of the United States army. I have always understood that the marriage between my sister and Mr. Clark was a private one, and that it was not promulgated by Mr. Clark, in his lifetime, unless he did so in a last will, made a short time previous to his death. I have heard that such a last will was made, but it was believed to have been suppressed or destroyed after his death.

"I was acquainted with Mr. Jerome Desgrange, for the first time, in New Orleans, about the year 1795. He passed for an unmarried man, and as such imposed himself on my sister Zulime. Some years after this marriage, it became known in New Orleans, that he had a prior lawful wife living. My sister immediately separated from him, and came to reside with her family. At a later period, Mr. Desgrange was prosecuted, found guilty of bigamy, in having married my sister Zulime, and cast into prison. He escaped from prison, as it was reported at the time, by the Spanish governor's connivance. I understood that Mr. LeBreton D'Orgenois aided him to escape from the country. This happened some time before the transfer of the government of Louisiana to the Americans. The flight of Desgrange from New Orleans is the last I know of him. I did not myself know the first wife of Desgrange, but it is within my knowledge that she came to New Orleans, and while there, fully established her pretensions as his lawful wife."

Another deposition of this witness is found in the record, taken October 16, 1849; but as it does not differ from the foregoing depositions on the question of bigamy, it is not further noticed.

* Objections were made on the argument, that the different depositions of these witnesses are contradictory in several respects; but we have not found them to be so in any material degree. Madame Despau's, so far as they relate to the question under examination, are very nearly literal copies of each other; and Madame Caillavet's are nearly similar to each other.

Joseph D. D. Bellechasse, in his deposition, taken in 1834, states:—

“I think it my duty now to declare, what I know to be a fact, that said Desgrange was condemned for bigamy in marrying Miss Carrière, (subsequently the mother of Myra,) several years prior to the birth of said Myra. The prosecution and condemnation of said Desgrange for said crime of bigamy, took place at New Orleans towards the close of the Spanish domination in Louisiana; his first and lawful wife, whom he had married previous to his coming to Louisiana, (as it was proved,) coming to New Orleans in pursuit of him. When said Desgrange practised the infamous deception of marrying Miss Carrière, it was the current opinion in New Orleans, that he was a bachelor, or a single man.”

Madame Bengueril, in her deposition taken in 1836, makes the following statement:—

“Mr. Jerome Desgrange married the said Zulime, which proved on his part bigamy, for, after his marriage with the said Zulime, the lawful wife of said Desgrange, whom he had married previous to his marrying the said Zulime, came to New Orleans, and he was thrown into prison, from which he escaped, and fled from Louisiana; this was in the year 1802 or 1803; since that period I have never seen the said Desgrange, and do not believe that he ever returned to Louisiana.

“The said lawful wife of the said Desgrange brought with her to New Orleans proofs of her marriage with the said Desgrange. The exposure, at that time, of the said Desgrange’s bigamy in marrying the said Zulime, was notoriously known in New Orleans.

“My husband and myself were very intimate with the said Desgrange, and when we reproached him for his baseness in imposing upon the said Zulime, he endeavored to excuse himself by saying that, at the time of his marrying the said Zulime, he had abandoned his said lawful wife, and never intended to see her again.”

This is the material evidence on which the complainant relies to prove Desgrange’s bigamy, when he married Zulime Née Carrière. What other evidence we may incidentally refer to, will be stated by the reporter.

To meet and rebut this evidence, the defendants introduced * from the records of the cathedral church of the diocese, to which the city of New Orleans belonged at that period, an ecclesiastical proceeding against Desgrange for bigamy; and which proceeding, as respondents insist, is the same to which complainant’s witnesses refer. The following are the material parts of that proceeding:—

“THE YEAR 1802.

“T. M. T.

“No. 141.

“ Criminal proceedings instituted against Geronimo Desgrange, for bigamy.

“ The vicar-general and governor of the bishoprick, judge.

“ Fran’co Bermudez, Notary.”

“ DECREE. In the city of New Orleans, the 4th day of September, 1802, Thomas Hasset, canonical presbytery of this holy cathedral church, provisor, vicar-general, and governor of the bishoprick of this province : —

“ Says, that it has been publicly stated in this city, that Geronimo Desgrange, who was married in the year 1794, to Maria Julia Carrière, was at that time married, and is so even now, before the church, to Barbara Jeanbelle, who has just arrived ; and also that the said Desgrange, having arrived from France a few months since, he caused another woman to come here, whose name will be obtained. It is reported in all the city, publicly and notoriously, that the said Geronimo Desgrange has three wives, and not being able to keep secret such an act, as scandalous as it is opposed to the precepts of our holy mother church, his excellency has ordered, that in order to proceed in the investigation, and to the corresponding penalty, testimony be produced to substantiate his being a single man, which the said Desgrange presented, in order to consummate his marriage with said Carrière ; that all persons shall appear who can give any information in this matter, and also Desgrange, with Celestin Lavergne and Antonio Fromantin, interpreters ; they, the interpreters, first accepting the nomination, and swearing to act as such faithfully. And also, as it has been ascertained that the said Desgrange is about to leave with the last of these three wives, let him be placed in the public prison, during these proceedings, with the aid of one of the alcades ; this decree serving as an order, which his excellency has approved, and as such it is signed by me, notary.

“ Signed, Thomas Hasset. Before me,

“ Fran’co Bermudez.”

“ New Orleans, in the same day it was passed to the Capitular * House, and audience hall of Don Fran’co Caisergues, alcade of this city, and in his jurisdiction, and I notified to his worship the preceding decree, and of which I have taken note.

“ Signed, Fran’co Bermudez.”

“ New Orleans, 4th September, 1802.

“ Let the request of the governor of the bishoprick be complied with.

Signed, Fran’co Caisergues. Before me,

“ Signed, Fran’co Bermudez

"In New Orleans on the same day, I, the notary, notified Celestin Lavergne of his appointment as interpreter, and he said that he accepted it; and swore by God and the Cross, that he would act well and faithfully in the premises, and he herewith signs his name.

"Signed, C'tino Lavergne. Fran'co Bermudez.

"On the same day I notified Antonio Fromantin of his appointment as interpreter, who accepted of it, and who swore by God and the Cross, that he would act well and faithfully in the premises, and he herewith signs his name.

"Signed, Antonio Fromantin. Fran'co Bermudez."

Next comes the church record filed as evidence in the cause establishing the marriage of Desgrange to Maria Julia Née Carrière, which need not be further stated.

The material parts of the subsequent proceeding are the following:—

"CITATION. In New Orleans, on the same day, I, the undersigned notary, inquired at sundry places for the residence of Dona Barbara Jeanbelle, and I was informed she lived in Mr. Bernard Marigny's house, where I then went, and there gave notice that, on Monday, the 6th instant, at seven o'clock in the morning, she must present herself before the tribunal, as per order of his excellency.

"Signed, Bermudez.

"On the same day, I notified the minister of justice, Jose Campos, of the preceding decree.

"Signed, Bermudez."

"TESTIMONY. Testimony of Dona Barbara Jeanbelle. In the city of New Orleans, on the 6th of September, 1802, appeared before Mr. Thomas Hasset, presbytery canon of this holy cathedral church, provisor, vicar-general, and governor of the bishoprick of this province and the Floridas, Dona Barbara Margarita Jeanbelle de Orsy, who was sworn to tell the truth, and the following questions were then propounded to her:—

[*515] *1. If she knows Geronimo Desgrange; how long, and where did she know him?

Answers: That she has known him for sixteen years, and that she was acquainted with him in New York.

2. Being asked whether it is true that she was married to the aforesaid Desgrange, in what place, in what church, how long ago, in what parish, by what clergyman, and who were the witnesses?

Answers: No, although it was her intention to marry the aforesaid Desgrange; but as the latter was going away, she changed her

mind; nevertheless, she obtained the permission of her father to go to Philadelphia for that purpose, and that while there Desgrange begged of her to come to this city to consummate the marriage, to which she did not consent. This took place about eleven years and a half ago.

Being asked whether she was acquainted with Desgrange in France, after the period above stated, and if she has ever spoken to him on the subject?

Answers: That last year she saw him in Bordeaux, and that she did not again speak to him of the marriage, because they were both of them married.

Being asked that, if she says she is married, with whom is she married, how long since, in what place, by what clergyman, and who were the witnesses?

Answers: That she is married to Don Juan Santiago Soumeylliat, about ten years ago, in the city of Philadelphia, by a Catholic priest, and that Mr. Bernardy and his wife were witnesses.

Being asked if she has any document to prove it?

Answers: That she has no document to prove it.

Being asked if she has not heard it said that Desgrange is married to three wives, say to whom, and if it is not public and notorious?

Answers: That she never heard any thing of what is asked her until last night, when she was told that it was said she was one of his wives, and she says that what she has declared is the truth; and the testimony having been read to her, which was interpreted by Don Celestino Lavergne, and Don Antonio Fromantin, she declared it was what she had said, and she now ratifies it; that she is thirty-four years old.

“Signed, B. M. Zambell De Orsi, Hasset,

“C’tino Lavergne, Antonio Fromentin.

“Before me, Fran’co Bermudez.”

“TESTIMONY OF MARIA YLLAR. In the city of New Orleans, on the same day, month, and year, appeared before his excellency, * Maria Yllar, who, being sworn to tell the truth, the [* 516] following questions were propounded to her:—

Being asked whether she is married or not, how long it is since she arrived in this city, and with what object?

Answers: That she is the widow of Juan Dupor, alias Poulé, who died two years ago, to whom she was married about — years; that she has never had any other husband, neither before nor since; that she arrived here two days ago, and that her object was to gain

a livelihood, having been informed it was a good country for seamstresses.

Being asked if she knows Geronimo Desgrange, how long, and if she was invited or told by him to come to this city, and with what object?

Answers: That she knew Geronimo Desgrange in France about eight months ago, and it was he who told her to come to this city, where she could gain a better livelihood than in her own country.

Being asked whether she was promised marriage to the said Geronimo Desgrange, or if she has entered into any private contract with reference to matrimony, or any other contract with him?

Answers: That she has not had any contract of the kind with the said Desgrange, because she knew, before her departure from France, that he was married in Louisiana; and that her coming here was only with the object that she has already stated.

Being asked [if] she had promised the said Desgrange to accompany him in the voyage he is going to make to France?

Answers: That far from accompanying Desgrange during his voyage, she thinks of remaining in the house of Cornelius Ploy, alias Flamand, to whom she has been recommended by the said Desgrange, for the purpose of gaining her livelihood by sewing, as the said Flamand is a tailor by trade.

Being asked if she has heard it publicly said that Desgrange has been married to two women before or since her arrival in this city?

Answers: That before her arrival she had heard nothing of the matter; but since she has been here she has heard it said publicly that Desgrange has been married three times; she swears that what she has said is the truth, and that she is twenty-five years old; she does not sign, not knowing how to write.

"Signed, Hasset, Antonio Fromentin, C'tino Lavergne.

"Before me, Franco. Bermudez."

"TESTIMONY OF MARIA JULIA CARRIÈRE. Then appeared [* 517] before *his excellency, Maria Julia Carrière, who, through the interpreters, was duly sworn to tell the truth, and the following questions were propounded to her.

Being asked whether she was married or single?

Answers: That she is married to Geronimo Desgrange, since the 4th of December, 1794.

Being asked whether she heard, before or since her marriage, that her said husband was married to another woman?

Answers: That about a year since she heard it stated, in this city that her husband was married in the north, and, in consequence, she

wished to ascertain whether it was true or not, and she left this city for Philadelphia and New York, where she used every exertion to ascertain the truth of the report, and she learned only that he had courted a woman, whose father, not consenting to the match, it did not take place, and she married another man shortly afterwards.

Being asked whether she had recently heard that her husband was married to three women, if she believed it, or does believe it, or has any doubt about the matter which renders her unquiet or unhappy?

Answers: That although she has heard so in public, she has not believed it, and the report has caused her no uneasiness, as she is satisfied that it is not true; she also swears that she is twenty-two years old.

Signed, Marie Zulime Carrière Desgrange, Hasset, his mark, C'tino Lavergne, Antonio Fromentin.

Before me, Franco. Bermudez."

"TESTIMONY OF GERONIMO DESGRANGE. In the city of New Orleans, on the 7th day of September, 1802, Thomas Hasset, presbyter canon of this holy cathedral church, provisor, vicar-general, and governor of this bishoprick of this province, caused to come before him and in presence of the interpreters, Geronimo Desgrange, who was duly sworn to tell the truth, replied to the following interrogatories:—

Being asked whether he knows Barbara Tanbel de Orsi, how long, and in what place?

Answers: That he first knew her in New York, about eleven years ago, and afterwards in Philadelphia.

Being asked that, if he was married to her, to state in what place, before what clergyman, how long ago, and who were the witnesses?

Answers: That he never was married to her, although he wished to do so, and had asked the consent of her father, but he refused it, as deponent was poor.

* Being asked whether, after leaving her in Philadelphia, [* 518] he has known her in any other place, and with what intentions?

Answers: That he has seen the said Dona Barbara in Bordeaux by mere accident; for, deponent being sick, Mr. Soumeyllatt, her husband, was sent for, and after he got well the said Soumeyllatt invited him to dine with him at his house, where he saw her, and was much astonished; and he afterwards continued visiting the house, with no other feeling than that of friendship, and with the knowledge of her husband.

Being asked if he knows Maria Yllar, to state how long he has known her, in what place, and with what motives?

Answers : That in the month of December, of last year, he knew her when she was in a boarding-house where she was employed as a servant, in Bordeaux, where the respondent lived.

Being asked if he made any arrangements with the aforesaid to accompany him to this city, to state what that arrangement was, and what object she had in coming here ?

Answers : That he made no arrangement nor agreement with the aforesaid ; and the reason she is here is, that having asked him whether this country held out better inducements than Bordeaux, in order to gain a livelihood by sewing, he advised her to come, as it would prove more advantageous to her.

Being asked whether his intention is to take her with him on the voyage he intends making, and if he has asked her to do so ?

Answers : That he has not thought of it, as she came here to gain her livelihood, and for no other purpose.

Being asked why Maria Julia Carrière, his wife, went to the north last year ?

Answers : That the principal reason was, that a report had circulated in this city that he was married to another woman. She wished to ascertain whether it was true, and she went.

Being asked if he has ever been examined by any ecclesiastical judge in relation to this affair ?

Answers : No.

Being asked whether it is true, that, in order to satisfy his wife and the public, he offered to bring with him or to procure documents to prove his innocence in this matter, and that if he have them, to show them ?

Answers : That, taking it for granted that this charge would naturally fall, his wife being satisfied of his innocence, and no judge having required the showing of such documents, he has used no exertions to obtain them ; and that he is forty-two years old.

Signed, J. Desgrange, Hasset, his mark, Antonio Fromentin, C'tino Lavergne.

Before me, Francisco Bermudez."

[* 519] * "DECREE. Not being able to prove the public report, which is contained in the original decree of these proceedings, and having no more proofs for the present, let all proceedings be suspended, with power to prosecute them hereafter, if necessary, and let the person of Geronimo Desgrange be set at liberty, he paying the costs.

Signed, Thomas Hasset.

Don Thomas Hasset, presbyter canon of this holy cathedral church,

vicar-general and governor of the bishoprick of this province of Louisiana and the two Floridas, has approved and signed the preceding decree, in New Orleans, this 7th September, 1802.

Signed, Francisco Bermudez.

In New Orleans, on the same day, notified Geronimo Desgrange of the preceding decree, and visited him in prison for that purpose.

Signed, Bermudez.

On the same day, notified said decree to Joseph Puche, the keeper of the prison.

Signed, Bermudez."

Bishop Blanc proves that the records of the Catholic bishoprick of Louisiana are in his charge; that he searched for the record of prosecution against Desgrange for bigamy, and found it; that it is a complete record of the whole proceeding; and that, Thomas Hasset, being first canon of the diocese, represented the bishop, and acted as vicar-general, the see being vacant at that time. Isodore A. Quemper also proves that he is the official keeper of the records of the cathedral church of St. Louis, at New Orleans, and the paper is an exact and literal copy of the original.

The signatures of Lavergne and Fromentin, who took the depositions, and that of Bermudez, the notary, are proved by witnesses who had seen them write; and the signature of Desgrange and Zulime were proved by experts, on comparison of hands with authentic signatures of theirs. Such proof is allowable in Louisiana, according to the civil code and the code of practice; and this mode of proof has not been objected to in this case.

Respondents also introduced the following evidence:—

On the 26th of March, 1801, Madame Caillavet, Madame Lasabe, and Madame Despau, joined in a power of attorney, authorizing Jerome Desgrange, their brother-in-law, to proceed * to [* 520] Bordeaux, in France, and there recover any estate or property belonging to them, as co-heiresses of their father and mother.

And, at the same time, Desgrange made a general power of attorney to his wife, Dona Maria Zulime, to act for him in all his affairs in his absence. She acted under the power, and sold several slaves, and did other acts, which appear in notarial records. In each of these acts she styles herself "the legitimate wife and general attorney of Don Geronimo Desgrange."

In July, 1801, Desgrange wrote to Clark the following letter:—

" Bordeaux, July, 1801.

" My Dear Sir and Friend: Although uncertain whether you

are at New Orleans, I hasten to seize the opportunity of the sailing of *The Natchez* to furnish you with some news. I hope my letter will find you in good health. When one has such a friend as you, we cannot feel too deep an interest in him.

"I have received here a great deal of politeness from Mr. John Bernard, merchant, a friend of Mr. Chew, who is a doing a very great business now. He spoke a great deal of Mr. Chew to me, and his politeness to him while at Bordeaux. He was introduced to me by Mr. Coxe.

"There has been many arrivals of American vessels, in this port since I was here last. Colonial goods are selling very well. I think if your friend from Philadelphia were to make a visit here, he could make a profitable speculation on his return voyage.

"Do me the kindness, my dear sir, to write to me. It will afford me much pleasure to hear from you. Several American vessels are about to leave, to come directly here.

"Present my compliments to Mr. Chew, and beg him, whenever he writes to Mr. Bernard, to speak of me. I have taken the liberty to inclose under your cover a package for my wife, which I beg you to remit to her. Permit me, my dear friend, to reiterate my acceptance of the kind offer you made me before I left, and should my wife find herself embarrassed in any respect, you will truly oblige me by aiding her with your kind advice. I expect to leave in a few days, to join my family. I hope to return to Bordeaux in two or three months, to terminate my affairs here, and to make preparations to meet you. I have been some days engaged in a lawsuit, for the purpose of recovering an estate belonging to my wife's family. I shall place this affair in Mr. Chicou St. Brie's care during my absence. I fear that I shall

have to expend a great deal in this affair. I have charged [* 521] * Mr. Bernard with the care of other business. I have not yet heard from my wife, which renders me very uneasy as to going to Provence before I hear from her. It is said that peace will be declared by the end of the year; but I have my fears whether we shall enjoy that happiness. Hoping to have the pleasure of hearing from you soon,

"I am, most truly, your friend,

"DESGRANGE.

"Write me to the care of Mr. Jean Bernard, merchant, at Charttron, Bordeaux."

The respondents introduced the deposition of Daniel W. Coxe, of Philadelphia. He had been the partner in trade of Daniel Clark, in their New Orleans house, from the time Clark set out as a commission and shipping merchant. They were nearly of the same age;

both proud, intelligent, and ambitious of success; equals in rank, and intimate in their social relations, as a common interest and constant intercourse could make them. This abundantly appears by their correspondence, introduced in the record before us. Coxe states that, in 1802, Madame Desgrange presented herself to him in Philadelphia, with a confidential letter of introduction to him from Daniel Clark, which stated that the bearer was pregnant, and would soon be delivered of a child; and that he, Clark, was the father of it; and the letter requested Coxe to put her under the care of a respectable physician, and to furnish her with money during her confinement and stay in Philadelphia. That Coxe, accordingly, employed the late Doctor William Shippen to attend her at her accouchement. That he, Coxe, procured a nurse for her; and removed the child, on the day of its birth, to the residence of the nurse; that this child was Caroline Barnes, who, before her marriage, always went by the name of Caroline Clark. The first nurse was Mrs. Stevens; afterwards, the child was placed, at Clark's request, with Mr. and Mrs. James Alexander, of Trenton, New Jersey, and continued there until 1814 or 1815. After this, (her father being dead,) she was placed at Mrs. Baisley's school in Philadelphia. She remained with Mrs. Baisley several years, and acted during part of the time as a teacher, and, Coxe thinks, continued there until she was married. She was under Coxe's supervision all the time, from her birth until her marriage; and was supported at the expense of Clark until his death. She was at all times, during his life, recognized by Clark as his child, and caressed as such when he was at Philadelphia.

Coxe further states that Madame Desgrange left Philadelphia for New Orleans as soon as it was prudent for her to travel, *after her confinement; and that this happened, he thinks, [* 522] in April of 1802; he says in another deposition that it was some time in 1802. Coxe was three times examined. Dates of letters from Clark to Coxe, and other evidence, show that the child was born as late as July, 1802; to wit, Clark reached Philadelphia about the 27th of July, 1802, as from his letter to Coxe appears; he hurried his business at Philadelphia and went to New York, where he wrote to Coxe, August 13, 1802, that he would sail for Europe on the next Tuesday; and he did sail, and returned early in 1803 to New Orleans, and was not at Philadelphia in 1803. Madame Despau and Coxe both prove that Clark was on his way to Europe, when Madame Desgrange and Madame Despau met him. Coxe deposes that the child had been lately born when Clark reached Philadelphia, and when he went to New York the two women very shortly after left for New Orleans,—that is to say, so soon as Madame Desgrange was able to travel.

A record of a suit brought by Zulime C. Desgrange against her husband, Jerome Desgrange, in November, 1805, for alimony, was also introduced by respondents. It will be further noticed hereafter.

This is substantially the evidence on both sides, on which the question depends, whether Desgrange was, or was not, guilty of bigamy in marrying Maria Julia Née Carrière, in 1794.

Objections are taken to several portions of this evidence; and especially as respects the record of the suit against Desgrange for bigamy in the ecclesiastical court.

First, it is objected that the record is not duly proved, the signatures of the witnesses not being established as having been signed to their depositions.

The answer to this objection rests on well-settled principles. All that is required in cases of this kind, is to produce a sworn copy of the record, the witnesses also proving that it was taken at the proper office, and produced by the lawful keeper of the records. In Phillips on Ev. by Cowen, vol. 1, 432, vol. 2, 133, 134, will be found the cases in support of this mode of proof.

Here the official keeper of the records and the bishop of the diocese, under whose charge they were, produced both the original and the copy; the copy was filed in this cause by stipulation of the parties; and each of the witnesses proved all the law requires to make it *prima facie* evidence.

On the argument at the bar, and especially in the printed one presented to us as coming from New Orleans, it is earnestly insisted that the origin of this record is recent, and that it had been fabricated for the purposes of this cause. We do not perceive any [* 523] ground for entertaining such an apprehension. * 1. The complainant's witnesses refer to such a proceeding. 2. The record of it was searched for by the complainant, and not found; and for this reason its substantial contents, as it was supposed, were proved in Patterson's case. 3. The signatures of the officers of the court are proved as being genuine. 4. Bishop Blanc deposes that he had charge of the records of the bishopric, among which he found this one.

If the allegation of fraud and forgery insisted on had any foundation, Bishop Blanc must of necessity be directly involved in that charge; and, furthermore, of swearing to that which he must have known to be false. This assumption is not only gratuitous, but the witness is fully supported by the facts above stated; and the further fact, that, neither in his cross-examination, nor by any other evidence, is his integrity assailed by the complainant.

The next objection is, that the record decided nothing, there being

no sentence concluding any one; and if there had been such sentence, it would be of no value, as it was a proceeding against Desgrange, to which neither Clark nor Zulime was a party, and therefore the record was incompetent to affect the rights of those claiming under them.

The competency of this evidence depends on other considerations.

For the purpose of establishing the bigamy of Desgrange, the complainant proved by her witnesses that he was arrested on a charge of bigamy, at the instance of his first wife; "that the said lawful wife of the said Desgrange brought with her to New Orleans proofs of her marriage with said Desgrange;" that the first wife appeared as a witness, and proved the bigamy; that Desgrange had confessed it; that he was convicted on his trial; and that he was imprisoned, and in execution, under sentence of the court; that this occurred in 1802 or 1803; that Desgrange escaped from prison by connivance of the public officers, or some of them, and fled the country, and never returned.

On this evidence, standing unopposed and uncontradicted, the complainant had a decree in her favor in the circuit court at New Orleans, establishing the bigamy of Desgrange; and in this court, in the case of *Patterson v. Gaines*, 6 How. 550, decided in 1848.

For the purpose of letting in this secondary evidence, the complainant introduced the deposition of C. W. Dreschler, made April 24, 1840, which is as follows:—

"That at the request of General Edmund P. Gaines, I have been engaged for several days, assisted by a gentleman who understands the Spanish and French languages well, in making very extensive and most diligent search at all offices, &c., in the different parts of this city, where records are kept and could *be [* 524] looked for, for the purpose of obtaining a copy of a prosecution against one Jerome Desgrange, convicted for the crime of bigamy, in the year 1802 or 1803, when Louisiana was under the Spanish government, and Cassaacalvo, the governor, by whose order the said Desgrange was arrested, imprisoned, &c., in this city; but that I have not been able to find the Spanish records of the aforesaid criminal proceedings, because almost all the Spanish documents, up to the 20th December, 1803, when Governor Claiborne issued his first proclamation, were taken away by the Spanish authorities, sent to Spain, and to the island of Cuba; and the few papers left in this city are in a loose or bad condition; as also, because many books and papers having been destroyed by fire, and lost by removing them on account of fire, during two occurrences of that kind.

"I am informed that Governor Claiborne made several ineffectual

applications to the Spanish government to return the papers taken away, to New Orleans; that persons have had to go to Havana for documents, titles to land, &c."

On this, and other proof that no record of the proceeding could be found, parol evidence of what occurred on the trial against Desgrange was let in, and the bigamy found on the secondary evidence in Paterson's case.

Here the same proof that the record of the proceedings was lost, was introduced; and what took place on that trial of Desgrange was again proved by depositions, which were filed in the circuit court before the record of Desgrange's trial was filed by the respondents. The object of its introduction by the respondents was, to rebut, contradict, and overthrow the evidence of the complainant's witnesses, by showing —

1. That no previous wife appeared against Desgrange on his prosecution.

2. That no documents of a former marriage were produced against him.

3. That his wife, Zulime, did not then charge him with being guilty of bigamy, denied all belief in the charge, and gave her reasons for it; which correspond with the statement made by the supposed first wife, Barbara Jeanbelle, and with Desgrange's own statement made on oath.

4. That Desgrange was not convicted, but discharged by order of the court.

5. That he did not flee the country, nor had any occasion to do so. And,

6. That so far from admitting his bigamy, he denied it on oath, lawfully administered; thus solemnly declaring that he never had been married previous to his marriage with said Zulime. Whereas, complainant's witnesses swear he made such confessions.

[* 525] *The complainant's principal witnesses are Madame Despau and Madame Caillavet. Madame Despau swears that in 1802 or in 1803, Madame Desgrange and herself went to New York for the purpose of ascertaining whether Jerome Desgrange had been previously married, where Clark overtook them; that no church record of the marriage could be found in the Catholic chapel at New York; but hearing that Mr. Gardette, of Philadelphia, knew something of the matter, they went there, and Gardette informed them that he was present at the first marriage; and that Clark and Zulime were then married. And that soon afterwards, they received a letter from Madame Caillavet, informing them that Desgrange's first wife had come to New Orleans, and they immediately re-

turned there; where Desgrange was prosecuted by his first wife, convicted and imprisoned; and that he fled the country, and never returned to it.

Madame Caillavet says Desgrange and Barbara Jeanbelle came together, or that Jeanbelle came immediately after him; and that she immediately wrote to her sisters to return.

It appears that in the spring of 1801, Desgrange went to France, to recover property coming by succession to his wife Zulime, and her sisters, from their parents, and lying at Bordeaux, or in that neighborhood; and that he had not returned when Zulime and Madame Despau left New Orleans for New York.

The ecclesiastical record states that he had been at home about two months before he was arrested; which was September 4, 1802. He was therefore absent from his wife Zulime about fifteen months.

Daniel W. Coxe proves, that Madame Desgrange brought him a letter of introduction from Clark, stating, that she was then far gone in pregnancy, and requesting Coxe's attention to her wants; that he furnished a house and money, and employed a nurse, and Dr. Shippen to attend her accouchement; that Clark's letter stated the child was his; and we must assume that the mother, by delivering the letter, impliedly admitted the fact. She was delivered; and Coxe had the child, on the same day, put with Mrs. Stevens to nurse. All this time, Madame Despau was with Madame Desgrange. Coxe superintended the child's nature and education, in and near to Philadelphia, until Clark's death in 1813, and afterwards. This was Caroline, who when grown up married Dr. Barnes; and who these witnesses swear without hesitation was the child of Desgrange; and who, Madame Despau swears, was born in 1801. Nor does either witness intimate that she was born in Philadelphia; or that their sister went there to conceal her adultery, and hide its offspring.

* They left Philadelphia for New Orleans, as soon as [* 526] Madame Desgrange was able to travel; and reported to the deluded husband on their return, that they had been north, seeking proof against him for bigamy, but had found none. This is the substance of what Desgrange himself stated on his examination in the criminal proceeding as derived from others. Zulime swore on the trial, that she had heard the report of Desgrange having another wife about a year before; that is, about the first of September, 1801. Then, Desgrange was in France.

It is true beyond question that these witnesses did know that their sister Desgrange went north to hide her adultery; that she did delude her absent husband, that she did impose on him the mendacious tale

that her sole business north was to clear up doubts that disturbed her mind, about his having another wife. These facts they carefully conceal in their depositions; and on the contrary swear that she went north to get evidence of her husband's bigamy and imposition on her.

When they swore positively that Caroline was the child of Desgrange, they did know that he had been in France, and his wife in New Orleans, and they had not seen each other for more than a year before the child was born; and Madame Despau could not be ignorant that Clark claimed it as his, and that the mother admitted the fact to Coxe.

These witnesses swear that Zulime had separated from Desgrange on discovering his bigamy, and gone to her own family. That this occurred before the family arrangement was made that Clark should marry her, and before Madame Desgrange and Madame Despau went north, to ascertain the bigamy. They also swear that Zulime returned to New Orleans about the time Desgrange was arrested and imprisoned in September, 1802, and was then the wife of Clark. There is no proof in this record tending to show that before Desgrange went to France he was suspected of bigamy, nor that his wife had separated from him; but there is evidence to the contrary.

When Desgrange went to France in the spring of 1801, he appointed his wife attorney in fact by notarial act, with full power to transact all his business in his absence. Under this power she acted and sold his property, paid debts, &c., and declared herself his lawful wife in every transaction.

Desgrange went to France with a full power to transact business for his wife and her three sisters, in which the latter style him their brother-in-law. This was his sole business in France, so far as this record shows; and when there, he wrote to Clark, in July, 1801, to assist his, Desgrange's wife; expressing his sympathies, forwarding a package for her, and regretting that he had not heard from [* 527] her. He also expressed the sincerest gratitude * for Clark's proffered kindness in providing for and aiding Zulime in his absence. From these facts it is clear, as we think, that at the time Desgrange left for Europe, he and his wife were on terms of intercourse and ordinary affection, and certainly not separated; and that the cause of their separation is found in the connection formed by Clark and Zulime in Desgrange's absence.

In support of the consistency of these witnesses, stress is laid on the fact that so strong was the rumor of Desgrange's having two other wives besides Zulime, that he was arrested, imprisoned, and tried on the rumor. This is certainly true; the record of his prose-

cution establishes the fact: But what circumstances are brought forth to show that there was any plausible ground for such rumor and such prosecution? Desgrange was a man somewhat advanced in life; he kept an humble shop for selling liquors and confectionery; this seems to have been his sole business. His wife Zulime was about twenty-two years old, and uncommonly handsome. He seems to have been a lone man in New Orleans, and his friends were his wife and her relations. In the face of these facts, it is assumed that he brought from France with him an additional wife, and that another followed him; with both of whom, and his third wife, Zulime, he was confronted before the authorities of the church.

The early times, and the unintelligent condition of much of the population of New Orleans at that day, must account for this absurd public opinion, and the proceedings founded on it.

It is palpable that the witnesses Despau and Caillavet, swear to a plausible tale of fiction, leaving out the circumstances of gross reality. These originated, beyond question, in profligacy of a highly dangerous and criminal character; that of a wife having committed adultery, and having been delivered of an illegitimate child, in the absence of her husband; not only on his lawful business, but on hers, and at her instance.

This child, with the knowledge of both of these witnesses, and certainly with the aid of one of them, if not both, was concealed in a foreign country, where the mother went and was delivered; and then she returned home to New Orleans and presented herself to society as an innocent and injured woman, and public indignation was turned on her husband for a supposed crime committed against her. This is the reality these witnesses conceal; roundly swearing that they knew this child to be Desgrange's.

They also swear that Clark arranged with Zulime's family before he went to Philadelphia, and had the assent of her family, to marry her; they having previously discovered Desgrange's bigamy. But, according to their account, so scrupulous and delicate was this injured woman, that she refused to marry *Clark [*528] until she went to New York, and there ascertained for herself the fact that Desgrange had another wife; that Clark soon followed Madame Desgrange and Madame Despau, as previously agreed on; and even then, Madame Despau swears, when Gardette had informed them that he was present, and witnessed Desgrange's first marriage, her sister's sense of propriety and delicacy was so great, that earnest persuasions had to be used by Clark to overcome her scruples. We cannot shut our eyes on the truth, and accord our belief to this fiction.

We have thus far spoken of the witnesses Despan and Caillavet in connection, because they acted in concert with their sister Desgrange and Clark, in secreting their intercourse, and in hiding the child that came of that intercourse: all the secrets involved were obviously known to the three sisters, whose confidential relation in the matter could hardly have been more close, as appears by their statements throughout.

Madame Despan is further discredited by Daniel W. Coxe's evidence. She swears as follows:—

“Mr. Clark became a member of the United States congress in 1806. While he was in congress, my sister heard that he was courting a Miss C., of Baltimore. She was distressed, though she could not believe the report, knowing herself to be his wife. Still, his strange conduct in deferring to promulgate his marriage with her had alarmed her, and she and I sailed to Philadelphia to get the proof of his marriage with my sister. We could find no record of the marriage, and were told that the priest who married her and Mr. Clark, was gone to Ireland. My sister then sent for Mr. Daniel W. Coxe, and mentioned to him the rumor above stated. He answered that he knew it to be true that Mr. Clark was engaged to the lady in question. My sister replied that it could not be so. He then told her that she would not be able to establish her marriage with Mr. Clark if he were disposed to contest it. He advised her to take the advice of legal counsel, and said he would send one. A Mr. Smith came, and, after telling my sister that she could not legally establish her marriage with Mr. Clark, pretended to read to her a letter in English, (a language then unknown to my sister,) from Mr. Clark to Mr. Coxe, stating that he was about to marry Miss C. And afterwards, she married Mr. Gardette.”

The following is Coxe's account of the interview:—

“I also think it proper to state, that in the year 1808, after Madame Desgrange had returned to Philadelphia from New Orleans, and when lodging in Walnut street, she sent for me, and during a private interview with her, at Mrs. Rowan's, where she lodged, she stated that she had heard Mr. Clark was going to be [* 529] * married to Miss C., of Baltimore, which, she said, was a violation of his promise to marry her, and added that she now considered herself at liberty to connect herself in marriage with another person; alluding, doubtless, to Dr. Gardette, who, at the moment of this disclosure, entered the room, when after a few words of general conversation, I withdrew, and her marriage to Mr. Gardette was announced a few days after.”

These contradictory statements raise a question of integrity be-

tween the witnesses. If they were equally entitled to credit, still, Coxe's statement has several advantages. First; Madame Desgrange disavowed, in the strongest terms, that she was the wife of Clark by marrying Gardette. Secondly; so important a communication as Madame Despau declares her sister made to Mr. Coxe; so ruinous to Clark's matrimonial prospects, and so deeply disgraceful to him, must have been remembered by Coxe, if such communication had been made.

Thirdly; Madame Despau swears that she and her sister Desgrange went to Philadelphia to obtain evidence of Clark's marriage with Zulime; that they could find no record of the marriage, and were told the priest, who performed the ceremony, had gone to Ireland. What occasion could there be for further proof? Madame Despau swears that Clark had proposed, and family arrangements had been made with him at New Orleans, to marry Zulime; that these proposals were made with the full knowledge of all Zulime's family; that Clark followed the witness and Zulime north to fulfil the engagement; that he met them, and the marriage took place; that she, Madame Despau, was present; that Mr. Dozier, a wealthy planter of New Orleans, and an Irish gentleman of New York, were also present.

Zulime's family consisted of three sisters and their husbands. Madame Cavaillet swears that Clark conversed with her as his sister-in-law, and admitted the marriage openly to her. Than this, no further proof of it could be required, if true.

The next evidence bearing on the question of Desgrange's bigamy is the record of a suit, brought by Madame Desgrange against her husband in 1805, for alimony, already referred to; and the deposition of Zulime, found in the record of the ecclesiastical proceeding, taken in connection with the first-named record. In her deposition, Zulime spoke of Desgrange in language admitting of no doubt that she then recognized him as her husband; and that no evidence of his bigamy existed so far as she knew or believed.

The deposition is objected to as not being evidence against the complainant. We have already declared that what appeared of record in the proceeding against Desgrange, was competent to rebut evidence introduced by the complainant tending to show what occurred on the prosecution; this being in effect [* 530] and fact proof of what the record contained. The deposition is now relied on as evidence in itself, tending to show that Desgrange was Zulime's lawful husband, according to her own confessions and showing at the time she deposed.

The competency of this deposition, taken as a confession, is ob-

jected to, on the ground that her signature to it was not legally proved, as this was done by comparison of hands, according to the statute law of Louisiana. The steps taken in the circuit court are conclusive of the objection.

On the 16th of January, 1850, the complainant's counsel gave notice to those of the respondents, that on Monday, the 21st, a motion would be made to suppress certain pieces of evidence; and among them the exhibit, obtained at the cathedral church of St. Louis, known as the "Ecclesiastical Record." The cause came on for hearing, January 22, and was heard on that and the seventeen succeeding days; but no motion to suppress evidence was made; and if there had been, this exhibit could have been proved at the hearing, by Zulime herself, if no one else had been found to do so; as the record shows that complainant's counsel admitted that Zulime was within the jurisdiction of the court, on the day the trial commenced. No objection having been made on the hearing below to this deposition, none can be raised here. To what extent it can be used, will appear from the following facts.

By an amendment to her bill, July 2, 1844, the complainant states:—

"Your oratrix alleges that she is entitled to the one moiety of the estate, of which the said Daniel Clark died possessed, by reason of a conveyance thereof, made to her by M. Z. Gardette, the widow of the said Clark, and the mother of your oratrix, on the 7th day of May, 1836, and which is hereunto annexed, marked A B, and prayed to be taken as part hereof; and the mother of your oratrix did thereafter, on the 20th June, 1844, further convey to her all her interest in said estate, as appears by her act, a copy of which is herewith exhibited, marked C; the whole of said estate having been acquired during the coverture of said Clark and wife.

The evidence corresponds with this allegation, and on it the complainant asks to have a decree for one half of the estate of Daniel Clark, as derived from her mother. Madame Despau and Madame Caillavet depose that Clark married Zulime shortly before her return to New Orleans, from Philadelphia, and before the trial of Desgrange took place, and when she must have been the wife of Clark, if ever she was. If Zulime was now before the court claiming her

[* 531] marital interest in Clark's estate, her declarations * made during the alleged coverture tending to show that she was not the wife of Clark, but of Desgrange, would be admissible against her, and if so, they are also admissible against any one who asserts the same title derived from her, after these declarations were made. Such a case is an established exception to the rule of evidence, ex-

cluding declarations of third persons not parties to the record. A declaration emanating from the claimant of any right or estate, which afterwards comes to the parties on the record by descent or purchase, affecting adversely the estate acquired, may be given in evidence against the party to the record who claims the estate. The authorities are numerous to this effect, and will be found in 1 Phillips, on Ev. 301, and in the notes by Cowen, 265. And the same rule applies to the record of the suit for alimony. That record would be evidence against the complainant's mother if she were a party to this suit; and it is equally evidence against the complainant as purchaser or donee from her mother; it shows the acts and conduct of the mother, on the question bearing on Desgrange's bigamy.

In the suit of 1805, the petitioner alleges that the county court of Orleans has jurisdiction on application of wives against their husbands, to grant alimony on the husband deserting his wife for one year, and in cases of cruel treatment; and the petitioner declares that her husband, Jerome Desgrange, had cruelly treated her; and likewise, that she had been deserted by him from the 2d day of September, 1802, until that time; that he had returned to New Orleans, from France, in the previous month of October, and was then in the city; and she prays, "that said Jerome Desgrange, your petitioner's husband, be condemned to pay her a sum of five hundred dollars per annum," &c. Desgrange was served with notice December 6, 1805, and final judgment entered against him, as prayed for by his wife, December 24, 1805.

We are called on here to try an issue on facts, as a jury would be bound to do, and find on them the issue between Clark's devisee and executors, and the purchasers claiming under them, on the one side; and the complainant claiming under her mother on the other, whether that mother was the lawful widow of Daniel Clark when she conveyed to the complainant.

This alleged widow swore before the authorities of the church in September, 1802, that she was the wife of Desgrange, and there spoke of him as her lawful husband; nothing to the contrary was then pretended. The presence before which she deposed, and the solemn manner in which it was done, give additional weight, in our judgment, to what she so deliberately declared on that occasion.

* In 1805, she again alleged in a legal proceeding, deeply [* 532] affecting her and Desgrange, that she was his lawful wife, and that he was her husband. The court sanctioned her statement by founding its judgment on it; and as a wife, she recovered the amount claimed as alimony.

With the full knowledge this woman had of all the circumstances

connected with the charge of bigamy against Desgrange, our judgment is convinced that she stated what was true, and that she was Desgrange's lawful wife at the time it is alleged she married Clark.

The claim, therefore, of the complainant, derived from her mother, must be rejected, as it stands condemned by the statements and acts of that mother herself.

The complicated and curious circumstances that surrounded this charge of bigamy against Desgrange in the Patterson case, and which were then so difficult to deal with, are easily enough understood now. A clew is furnished to unravel the mystery, why it was that an humble shopkeeper should be of sufficient consequence to excite public indignation, be the object of general and gross reproach, and for his name afterwards to appear in the columns of the only newspaper then published in New Orleans, an extract from which the complainant has given in evidence. There an account was given of Desgrange's alleged crime of bigamy, and the enormity of his conduct in marrying Zulime Née Carrière, whose artless innocence he so basely imposed upon. The mystery is explained by the fact now presented, that in Desgrange's absence to France, his wife formed a connection with Clark, and the child Caroline came of that illicit connection. On Desgrange's return home, Madame Caillavet notified her sisters to return in haste, as Desgrange's first wife was at New Orleans. Mesdames Despau and Desgrange forthwith returned, and at this time it was that Desgrange was so fiercely assailed by public opinion, and very soon after arrested on general rumor and tried for bigamy. The reports, to which these witnesses swear, obviously originated with, and were relied on by Madame Desgrange, her sisters and friends, to harass and drive Desgrange from the country, so that his wife might indulge herself in the society of Clark, unincumbered and unannoyed by the presence of an humble and deserted husband. And this was in fact accomplished, for Desgrange did leave the country soon after he was tried for bigamy, and Clark did set up Desgrange's wife in a handsome establishment, where their intercourse was unrestrained.

In 1805, when Desgrange again came to New Orleans, his wife immediately sued him for alimony, as above stated; speedily [* 533] got judgment against him for \$500 per * annum; on the same day issued execution, and again drove him away.

Bellechasse and Madame Benguerel swear that Desgrange married Zulime, and that he was afterwards condemned for the crime of bigamy; his first and lawful wife coming in pursuit of him to Louisiana, and appearing against him, and producing the documents of her marriage. That this happened in 1802 or 1803, and that Des-

grange fled. Their statements are substantially the same in this respect.

They are so obviously founded on common report, as to be of no value in themselves; certainly no decree could be founded on them. But when contrasted with the record of Desgrange's prosecution, they turn out to be entirely contrary to the truth; as no first wife appeared against Desgrange; no documents of a former marriage were produced; and no conviction took place; nor did he flee from the country. These aged persons swore as to what common rumor and public clamor were forty years before, and nothing more.

Madame Benguerel also swears, that she and her husband were intimate with Desgrange, and when they reproached him for his baseness in marrying Zulime, he endeavored to excuse himself by saying, "that, at the time of his marrying said Zulime, he had abandoned his said lawful wife, and never intended to see her again." As already stated, this must have happened after Desgrange returned from France, for there is no evidence that before he went there any such report existed. Zulime proved, on the prosecution for bigamy, that she had first heard the report about a year before she was examined.

We deem it extremely improbable, that a man should openly confess to the friends of Zulime, who reproached him with having committed a foul and high crime, that he was guilty; and this, too, on the eve of his apprehension and examination, on which he was compelled to give evidence against himself, when he swore that there was no truth whatever in the charge, and in which he was supported by this supposed first wife, who was then examined, and also by Zulime herself.

On the admissibility of Desgrange's confession, that he committed bigamy when he married Zulime, the question arises whether this confession (if made) could be given in evidence against the defendants? They do not claim under Desgrange; he was not interested in this controversy when it originated, and was competent to give evidence in this cause at any time, if living, to prove, or disprove, that a previous marriage took place, and was in full force, when he married Zulime. Phillips, in his *Treatise on Evidence*, vol. 3, 287, Cowen's edition, lays down the rule with accuracy, and cites the authorities in its support; which rule is, that "either of the [* 534] married parties, provided they are not interested in the suit, will be competent to prove the marriage; and either of them will also be competent to disprove the supposed marriage; and they may give evidence as to the fact whether their child was born before or after marriage."

If Desgrange could overthrow his marriage with Zulime by confessions, at one time, so he could at any other time; and on this assumption, his confession of a previous marriage could have been admitted at any time before the trial, or at the trial, when he stood by, and might be examined as a witness.

The great basis of human society throughout the civilized world is founded on marriages and legitimate offspring; and to hold that either of the parties could, by a mere declaration, establish the fact that a marriage was void, would be an alarming doctrine.

This admission was not one tending to establish pedigree, where hearsay of parents and others is admissible; it went to the specific fact of bigamy; and, according to the language of the supreme court of Louisiana, in *Harmar v. McLeland*, 16 Louis. R. 28, "in such serious matters, the law requires more than the simple confession of one of the parties to dissolve forever the bonds of matrimony between them." That was a case seeking a divorce on a written confession of the husband, who had married a second wife; but the principle declared in that case, and the one governing the present, is the same. It upholds a great policy, on which society is founded.

The letter of Desgrange to Clark, of July, 1801, from Bordeaux, is objected to as incompetent. We think it is competent to prove the state of feeling, affection, and sympathy of Desgrange towards his wife, when he wrote the letter; and, also, the date is evidence to prove where the writer was, and the time when he wrote. There is no ground to suppose that the letter was written collusively. It appears to have been ingenuous, and honestly intended. The doctrine, why such a letter is admitted, is laid down accurately in 1 Phillips's Ev. by Cowen, 189, 190.

In addition to the foregoing evidence to prove the bigamy of Desgrange, a certificate in the Latin language was introduced, on part of the complainant, purporting to be that of William V. O'Brien, dated September 11, 1806, declaring that he had, (July 6, 1790,) as pastor of St. Peter's Church, in the city of New York, married, in that church, Jacobus Desgrange to Barbara M. Orsi.

It is proved that this priest had charge of St. Peter's Church in 1790, and in 1806; that the certificate was in his hand-
[* 535] writing, *and in due and ordinary form; that the priest died about 1814, then still being in charge of the same church; and that no record of the marriage was found in the records of the church in 1849, when the witnesses deposed to the handwriting of the priest. It is also proved that this certificate was found among the papers of Gardette, who married the complainant's mother in 1808; that the paper was found after the suit against Patterson was decided, and delivered to the complainant by her mother.

The true name of Desgrange is not in the certificate. It was Geronimo, not Jacobus. Nor was the woman's name given so as to correspond with that of the alleged first wife of Desgrange. Her name was Barbara Jeanbelle. De Orsi is an affix, describing a place to which the party belongs, or has belonged. The woman's name is given as Barbara M. Orsi, and we suppose no Catholic priest thus describes a person he has married, in his marriage register. No identity of person is proved. No cohabitation as man and wife, between Desgrange and Barbara Jeanbelle, is proved.

But waiving all these objections, and still we think this certificate mere hearsay evidence, and that of a very dangerous character, and this for several reasons. It was given sixteen years after the marriage purports to have taken place, and might just as well have been given, had the priest been alive, forty years after the marriage, and on the eve of the trial.

In England, by the statute law, copies from parish registers are received to prove marriages; but the paper produced must be a sworn copy of the parish register, and not a certificate of the officiating clergyman; nor will a copy of a foreign register be received in evidence, on proof that it is a true copy.

If it were allowable in this country to give such certificate in evidence, where every clergyman of all denominations can perform the ceremony of marriage, and where it is performed by justices of the peace in many of the States, it would open a door to frauds that could not be guarded against.

And then again, certificates of marriage might be produced by those coming to this country from Europe. For no reason exists why a priest in any part of the world should not have accorded to his certificate all the credence that ought to be given to the one here produced, as Louisiana and New York were foreign to each other in 1790.

The respondents introduced the copy of a mutilated record, to which objection was made on behalf of complainant, but which comes up in this record, and is now relied on, for the complainant, to prove the bigamy of Desgrange. It purports to be a suit of Zulime Carrière against Jerome Desgrange, commenced in 1806, *in the former county court of Orleans. A curator [* 536] was appointed for Desgrange, who was absent; and the curator, Ellery, was summoned to answer the petition; but no petition is produced. Ellery demurred, and stated, as cause of demurrer, that the county court had no jurisdiction of cases of divorce, nor the court power to pronounce therein; and that the damages, prayed for in said petition, cannot be inquired into or assessed until after judg-

ment of the court touching the validity of the marriage shall be first declared; and he therefore demurred. The demurrer was joined. Afterwards the curator filed the general issue.

All we find further, is a copy of the docket entries which the clerk was bound to keep by the act of April 10, 1805, sec. 11, for the inspection of the public. The docket entry is as follows: "Petition filed June 24, 1806. Debt or damages \$100. Plea filed July 1, 1806. Answer filed July 24, 1806. Set for trial 24th July." The witnesses are stated and the costs given; and then follows: "Judgment for plaintiff, damages \$100, July 24, 1806."

This proceeding is relied on as in itself establishing the fact, that the marriage between Jerome Desgrange and Marie Julia Née Carrière, was thereby declared null.

To give the record this effect, it must appear that the plaintiff did set out in her petition the fact that said marriage was null by reason of the bigamy of Desgrange, and that she prayed to have its nullity adjudged by a judicial decree, and that such decree was made on the issue. Nothing of the kind appears here. We have no evidence what the cause of action was, nor can any inference be drawn from the memoranda made by the clerk that the suit was to establish the bigamy. All that appears from these memoranda is, that debt or damages, to the amount of \$100, was claimed by the plaintiff, and that \$100 in damages was recovered. Nor does the demurrer contradict this assumption. This mutilated record, therefore, proves nothing in this cause.

In regard to this record, the answer of Beverly Chew and Richard Relf avers, "that on or about the 24th of June, 1806, the aforesaid Zulime Née Carrière, wife of the said Jerome Desgrange, did present another petition to the competent judicial tribunal of the city of New Orleans, therein representing herself as the lawful wife of, and having intermarried with the said Jerome Desgrange, and praying for a divorce and a dissolution of the bonds of matrimony existing between her and the said Jerome Desgrange, and which was subsequently decreed: to wit, subsequent to the birth of said Myra." If it was true, that as lawful wife, Zulime Née Carrière sued, and did admit by this proceeding that she was the lawful wife of [* 537] Desgrange; yet it could *only affect the interest the complainant sets up under her mother. But as the record does not show what the cause of action was, it is of no value for either side.

On the 20th January, 1849, Gaines and wife filed their supplemental bill against all the defendants, and among other matters set forth the decree made in their behalf by this court, in the case of *C. Patterson v. Gaines and wife*, at December term, 1847; and com-

plainant set up that decree as having adjudged and decided against all the defendants to this suit, that Myra Clark Gaines was the legitimate child and forced heiress of Daniel Clark, and that she was legally and equitably entitled to receive of Relf and Chew, and all persons holding under them, all and singular the estates and property claimed by the original bill; and that although neither of them were nominal parties to said decree, yet each of them is bound and concluded thereby; they and each of them holding the same relation to your oratrix as the said Charles Patterson did, and they and each of them having joined in the interrogatories propounded to the witnesses upon whose testimony said decree was rendered, and propounded cross-interrogatories to said witnesses.

The defendants admit that such a decree was rendered, but deny that it is conclusive on them, or that it ought to affect their right; and that if the decree could do so, yet it ought not to have this effect in the present instance, because they aver and set forth and plead the same as a matter of defence; that said decree was brought about, and procured by imposition, combination, and fraud, between said complainants and Charles Patterson, and that, therefore, it should not be regarded in a court of justice for any purpose whatever. That said decree was designed as no honest exposition of the merits of the case; but was brought about, allowed, and consented to, for the purpose of pleading the same as *res judicata* upon points in litigation not honestly contested.

Charles Patterson was called on by respondents to give evidence on their behalf, to establish the fact that his suit with Gaines and wife was not honestly defended by him; and he was required by interrogatories to depose whether he had lost any thing by the decree against him. He answered that he caused the proofs from the court of probate in New Orleans to be given in evidence in the cause; that this was done by consent of General and Mrs. Gaines, who told him to get all the evidence possible, the stronger the better; that it would be more glorious to have it as strong as possible.

He furthermore deposed that General Gaines and his wife gave him a writing under their hands that they would not take any property from him, and that they would make his title *good. He also stated that General and Mrs. Gaines were [* 538] to pay the costs if the suit was decided against him, Patterson; that he paid most of them, and that General and Mrs. Gaines refunded the money to him; that he also paid the counsel who appeared for him at Washington, but the money was refunded by General and Mrs. Gaines.

He further stated that he was particularly requested by General

and Mrs. Gaines, to use his best exertions, with the aid of the best counsel he could employ, to make every defence in his power to the suit, and of which it was susceptible, and that he did so.

The suit was for Patterson's residence in New Orleans, and he admits that he has never been disturbed in his possession, by the decree against him, nor does he expect that he ever will be.

That this proceeding on the part of Patterson and General and Mrs. Gaines was amicable, and that no earnest litigation was had is too manifest for controversy. They agreed to go to trial at once on the depositions found in the probate court; and as Patterson was to lose nothing by the event, he was of course indifferent as to what evidence might be introduced on the hearing.

It also appears by his evidence that when a decree was obtained in the circuit court against him, his name was used to carry up an appeal to this court; but it was in fact brought up by General and Mrs. Gaines. Patterson employed counsel here, who of course had to take the record as they found it, and make the best of it they could; and it is conceded on all hands, they did so; and made the best exertions for Patterson they could do on the record brought up by him, as they supposed. Nevertheless, an affirmance of the decree was had in this court. It could hardly be otherwise in a case managed as this was; the object of the complainants below, being to obtain a favorable opinion and decree, on the law and facts of a case, made up at their own discretion.

But the cause before us presents an aspect altogether different; the proceeding against Desgrange before the vicar-general, introduced here by the respondents, from the archives of the cathedral church of St. Louis, at New Orleans, is in our opinion sufficient in itself to produce a different decree from that given in Patterson's case.

That record; the power of attorney from Desgrange to his wife; and the one from his wife and her sisters to him, to pursue and recover their property in France; his letter to Clark of July, 1801; the proof of his absence from his wife for more than a year before Caroline was born; the record of the suit for alimony [* 539] prosecuted in 1805, by his wife against Desgrange, together with Daniel W. Coxe's evidence, as it now stands, fortified as it is by letters showing dates, consistency, and accuracy, are all new; and make up a defence altogether conclusive.

The following is the result of our conclusions:—

1. That the complainant's two principal witnesses, Madame Despau and Madame Caillavet, are not worthy of credit.

2. That the depositions of Bellechasse and Madame Benguerel obviously state hearsay and rumor, and are worth nothing, in so far as mere hearsay and rumor is detailed by them.

3. That the naked confession of Desgrange, that he had been guilty of bigamy, made to Madame Benguerel and her husband, is incompetent evidence, and inadmissible as against these respondents; even admitting that such confession had been made, as stated by the witness.

4. That the certificate of William V. O'Brien is inadmissible, and must be disregarded.

5. That the record of the suit of Zulime Carrière, against Jerome Desgrange, prosecuted in 1806 in the county court of Orleans, proves nothing, and is incompetent.

6. That the decree of this court in Charles Patterson's case does not affect these defendants for two reasons: 1. Because they were no parties to it; and 2. Because it was no earnest controversy. And

7. That the record of Desgrange's prosecution for bigamy overthrows the feeble and the discredited evidence introduced by complainant to prove the bigamy of Desgrange, by marrying Marie Julia Née Carrière in 1794; and establishes the fact that Desgrange was her lawful husband, in 1802 or 1803, when complainant alleges Daniel Clark married her mother; and that therefore complainant is not the lawful heir of Daniel Clark, and can inherit nothing from him; and, consequently, that the complainant can take no interest under her mother, by the conveyance set forth in the amended bill, she not being the widow of Daniel Clark.

The question decided concludes this controversy; nor shall we go further into it.

The harshness of judicial duty requires that we should deal with witnesses and evidences, and with men's rights, as we find them; and it is done so here. But we sincerely regret that it could not be satisfactorily done, without making exposures that would most willingly have been avoided.

It is ordered that the decree of the circuit court be affirmed, and the bill dismissed.

No. 150 of Myra Clark Gaines v. F. D. de la Croix, Richard Relf, and Beverly Chew; and No. 151 of the same complainant v. D. F. Kermer, J. S. Minor, Relf Chew *et al.*, depend on [* 540] the same facts as the foregoing case. In these, also, the decrees below will be affirmed, and the bills dismissed.

Wayne, J., and Daniel, J., dissented.

WAYNE, J., delivered the following dissenting opinion.

I dissent from the judgment just given, and will give my reasons for doing so as briefly as I can. But it will necessarily occupy some time.

I believe that the case of the complainant has been proved beyond a reasonable doubt, as the law requires it to be done; I say, as the law requires it to be done, without meaning to imply any doubt of the fact, but that the fact has been proved according to those rules which experience has shown to be necessary and sufficient to guard conjugal and other domestic relations from capricious and unregulated judgments. Those rules are to be found in adjudicated cases of our own and of the English courts, and in the conclusions of the civil and canon law applicable to cases of this kind.

I think it has been proved that Myra Clark Gaines is the only child of her father, Daniel Clark, by his marriage with her mother, Zulime Carrière. That when the marriage took place, the parties were willing to contract, able to contract, and that they did contract marriage in Pennsylvania, according to the laws of that State, in the year eighteen hundred and two. I also think that there was nothing then or now in the laws of Louisiana which lessens in any way the validity of that marriage. The proofs of these declarations shall hereafter be pointed out, with the law in support of them.

My first object is, to state the evidence relied upon by the parties to this suit, and in what way it should have been examined and appreciated by this court, before its judgment was given. In other words, I mean to say that a judgment has been given against the complainant upon testimony introduced into the record of the case against the protest of her counsel, which is altogether inadmissible under the rules for the admission of testimony in courts of justice, and which have hitherto been observed and enjoined by this court in its judgments. And, further, that admissions and averments in the answer of the defendants in respect to certain portions of testimony offered by them, have been overlooked, by which the complainant has been deprived of proofs, which time out of mind in chancery have been considered conclusive of the fact affirmed in an answer, whether or not the same makes against a defendant or for a complainant.

[*541] *Secondly, I will show that all of the testimony of a documentary kind introduced by the defendants, except one of them, ought not to have been received by this court as evidence, on account of some of them not being properly authenticated as records of a judicial character, and because others being *res inter alios acta, aliis nec prodest nec nocet*. And that such documents or papers, for the causes just stated, have always been rejected by the courts of common law and by courts of chancery, and, further, that they would not have been received in the courts of Louisiana if this case had been in one of its tribunals.

The defendants deny the marriage between the complainant's father and mother; and if there was a marriage, they contest its validity on account of her mother having then another husband alive. It is admitted that a marriage had been solemnized between her and Jerome Desgrange, but the complainant shows, by competent testimony sufficient to establish the fact, that Desgrange was a married man, with a wife alive when he married her mother. That such being the fact, their marriage was void *ab initio*, and that she was at liberty to marry with another, as if no such connection had ever existed between Desgrange and herself. In other words, that such a connection, though entered into according to the forms of marriage, makes no impediment by the civil, the canon, or common law, in the way of a second marriage by the party imposed upon. The defendants rejoin, saying, even though the marriage with Desgrange was void on account of his bigamy, that she could not contract marriage again before she had obtained a sentence of nullity of her marriage with Desgrange. It is also urged by the defendants, if there was a marriage between the father and mother of the complainant, that it was void on account of what the canon law terms its clandestinity. That, according to that law, as it then prevailed in Louisiana, the issue of such a marriage was illegitimate, and that it has no civil effect to give rights of property or inheritance to the issue of such a marriage. To this the complainant replies that the marriage of her father and mother was solemnized in the State of Pennsylvania according to the law of that State. That the *lex loci contractus* gives to the issue the *status* of legitimacy for all purposes in Louisiana and elsewhere, whether the issue was born there or out of its jurisdiction; and, further, that marriages which have been clandestinely solemnized, that is, by not observing the solemnities of the church, though they are condemned by the canon law, as it existed in Louisiana, are not made void — *cap. quod nobis. tit. que filii sunt legis*. To the objection that there had not been a sentence of the nullity of the marriage with Desgrange, the complainant answers that, when a marriage by the canon law, and *as it then was in Louisi- [* 542] ana, is *ipso facto* null and void, that no declaratory sentence of nullity is absolutely necessary, though it may be expedient to have one, to reinstate the parties in their original unconnected condition. That this is especially so when one of the parties at the time of marriage had been previously married, and that marriage had not been dissolved by death or by operation of law. That a sentence of nullity is only absolutely necessary to restore the ability of persons to marry when it is sought to have a marriage declared *de facto* void on account of non-compliance with the law directing the mode for

solemnizing marriage, or when one of the parties seeks a dissolution on account of fear, — such as the fear of death or imprisonment having been used to compel a party to marry, — or where the marriage is voidable for incest or impotence, or if the woman is *nimis arcta*, for which an ecclesiastical court will pronounce it null and void in the lifetime of the parties, which, when done, restores the parties, except in the third case mentioned, to their former ability to contract espousals and marriage with others as if they had not been in that connection with each other.

The defendants, to maintain their denial of the marriage between the father and mother of the complainant, attempt to discredit her witnesses who were examined to prove it. For that purpose, they examined persons as to the character of the witnesses. They attempt to show contradictions in the testimony of two of them taken at different times, and allege concealment of facts which it is said they were bound to disclose in their examination; and they were also permitted to put in evidence certain papers relating to the marriage with Desgrange, and its continuance after the alleged marriage of Zulime with Clark. Those papers are: 1. One termed an ecclesiastical prosecution of Desgrange for bigamy in 1802; 2. The proceedings of a court in Louisiana in 1805, at the instance of Zulime against Desgrange for alimony; 3. Another for a like purpose, at the instance of Mr. Davis, to whose care the complainant was confided by her father in her infancy, in which she is called a natural child of her father; 4. An imperfect record of a suit brought by the complainant's mother in 1806, in her maiden name against the name of Desgrange, for a divorce or a sentence of nullity of their marriage, in which there was a judgment against him, or in her favor.

The last record stands in this suit upon a different footing from the ecclesiastical proceedings, inasmuch as it is properly authenticated to make it evidence as a judicial record, and the other is not so.

Also, because the defendants introduce it and declare it in [* 543] their answers to be a petition by the complainant's * mother,

Zulime Née Carrière, wife of the said Desgrange, to a competent judicial tribunal in New Orleans, therein representing herself as the wife of Desgrange, and praying for a divorce and dissolution of the bonds of matrimony existing between her and Desgrange, which was subsequently decreed, after the birth of the complainant. And they further aver in their answers that, having obtained a divorce, and having resumed her maiden name, she afterwards, in 1808, intermarried with one James Gardette. The defendants also rely upon the conduct of Clark and Zulime, before and after it is said they were married, to disprove their marriage, and to establish that

they were illicitly connected, before and until after the birth of the complainant. She resists this, by proofs which will hereafter be more particularly noticed, and further urges that, the defendants having alleged in their answers a divorce between Desgrange and her mother by a competent tribunal, they cannot now be permitted to disclaim it, for, though the petition in that case has not been returned with the rest of the record, on account of its loss, that its object and purpose are made out both by external and internal proofs in what remains, as the law requires the loss of the whole or of a part of a judicial record to be supplied, and in that way it is shown to have been a petition for a sentence of nullity of her marriage with Desgrange, on account of its original invalidity.

Having stated the positions taken by the parties in respect to the marriage between Clark and Zulime, between her and Desgrange, and her subsequent connection with Gardette without a divorce from Clark, when he had abandoned her, and the legal points raised and replied to by both parties, I will now proceed to state the kind of testimony upon which they respectively rely, the use which has been made of it, indicating at the same time what I believe to be the law upon each point of the complainant's case, and also upon all of those made by the defendants.

1. As to the marriage between the father and mother of Mrs. Gaines: It is proved by one witness, Madame Despau, her aunt, who was present at the marriage when it took place in Philadelphia. By another witness, Madame Caillavet, also her aunt, who swears that Clark made proposals of marriage for Zulime to her family, after her withdrawal from Desgrange, which was caused by her having heard that he was the husband of another woman then alive. She also swears that Clark, after his marriage with Zulime, admitted it to her, and that so did Zulime. They also rely upon Clark's acknowledgment of his marriage to three other witnesses, Mrs. Harper, Bellechasse, and Boisfontaine, to each of whom he repeatedly said that Myra * was his legitimate child, also upon [* 544] his treatment of her, and declarations concerning her, from her birth to within two hours of his death, when he declared that Myra was his legitimate child. One of these witnesses, Mrs. Harper, is the lady who suckled Myra with her own child; not as a hireling for that office, but as the friend of Clark. To this witness he made at different times frequent declarations of the child's legitimacy, and of his marriage with her mother; and to another of the witnesses, Boisfontaine, Clark said that he would have avowed the marriage, but for her subsequent connection with Gardette. In proof also of the marriage and of the child's legitimacy, they rely upon the facts

that Clark made large provisions of fortune for her in trust to others, to whom he declared her to be his legitimate child when the trusts were made, and that a short time before his death, he made a will in her favor as his universal legatee, in which she was declared to be his lawful child, about which will he spoke with anxiety and penitential affection within an hour before his death, as having by that act repaired the wrong he had done her.

The witness, Madame Despau, says she was at the marriage of Zulime and Mr. Clark, in 1802 or 1803, that it took place in Philadelphia, and the ceremony was performed by a Catholic priest, in the presence of other witnesses as well as herself. She states that she was present when her sister gave birth to Mrs. Gaines, that Clark claimed and acknowledged her to be his child, that she was born in 1806. That the circumstances of her marriage with Daniel Clark were these: Several years after her marriage with Desgrange she heard he had a living wife. Our family charged him with the crime of bigamy in marrying Zulime. He at first denied, but afterwards admitted it and fled from the country. These circumstances became public, and Mr. Clark made proposals of marriage to my sister, with the knowledge of all of our family. It was considered essential, first, to obtain record proof that Desgrange had a living wife at the time he married my sister, to obtain which from the Catholic church in New York, where Mr. Desgrange's prior marriage was celebrated, we sailed for that city. On our arrival there we found that the registry of marriages had been destroyed. Mr. Clark arrived after us. We heard that a Mr. Gardette, then living in Philadelphia, was one of the witnesses of Mr. Desgrange's prior marriage. We proceeded to that city and found Mr. Gardette. He answered that he had been present at the prior marriage of Desgrange, and he afterwards knew Desgrange and his wife by that marriage. That this wife had sailed for France. Mr. Clark then said: "You have reason no longer to refuse being married to me. It will be necessary, however, to keep our marriage *secret till I have obtained judicial proof of the nullity of your marriage with Desgrange." "They were then married. Soon afterward our sister, Madame Caillavet, wrote to us from New Orleans, that Desgrange's wife whom he had married prior to marrying Zulime had arrived at New Orleans. We hastened our return to New Orleans. He was prosecuted for bigamy; Father Antoine, of the Catholic church in New Orleans, taking part in the proceedings against Desgrange. Mr. Desgrange was condemned for bigamy in marrying Zulime, and was cast into prison, from which he secretly escaped by connivance, and was taken down the Mississippi River by Mr. Le Breton D'Orgenois,

where he got to a vessel, and, according to the best of my knowledge and belief, never afterwards returned to Louisiana. This happened in 1803, not a great while before the close of the Spanish government in Louisiana. Mr. Clark told us that before he could promulgate his marriage with my sister, it would be necessary that there should be brought by her an action against the name of Desgrange. The anticipated change of government created delay, but at length, in 1806, Messrs. James Brown and Elizaer Fromentin, as the counsel of my sister, brought suit against the name of Desgrange in the city court, I think, of New Orleans. The grounds of said suit were, that said Desgrange had imposed himself in marriage upon her at a time when he had a living lawful wife. Judgment in said suit was rendered against Desgrange. Mr. Clark still continued to defer promulgating his marriage with my sister, which very much fretted and irritated her feelings. Mr. Clark became a member of the United States congress in 1806. While he was in congress my sister heard that he was courting Miss Caton, of Baltimore. She was distressed, though she could not believe the report, knowing herself to be his wife; still, his strange conduct in deferring to promulgate his marriage with her had alarmed her. She and I sailed for Philadelphia to get the proof of his marriage with my sister. We could find no record, and were told that the priest who married her and Mr. Clark, was gone to Ireland. My sister then sent for Mr. Daniel W. Coxe, mentioned to him the rumor; he answered that he heard it to be true that Clark was engaged to her. My sister replied it could not be so. He then told her that she would not be able to establish her marriage with Mr. Clark, if he was disposed to contest it. He advised her to take counsel, and said he would send one; a Mr. Smythe came and told my sister that she could not legally establish her marriage with Mr. Clark, and pretended to read to her a letter in English, (a language then unknown to my sister,) from Mr. Clark, to Mr. Coxe, stating that he was about to marry Miss Caton. In consequence of this information, my sister Zulime came to the conclusion * of having no further communication or inter- [* 546] course with Mr. Clark, and soon after married Mr. Gardette, of Philadelphia."

The testimony of this witness has been given in her own words, in her answers to questions put on both sides. The cross-interrogatories were filed by distinguished counsel, having before them at the time the direct interrogatories to be put to the witness. It often happens, in the investigation of causes, that the capacity of the advocate has an influence upon our conclusions in respect to testimony. It is right, also, in this remarkable suit, that those who have been

professionally connected with it, for or against the complainant, should be mentioned. In this instance, it will show that the cause was conducted by lawyers of ability and experience, and that they made a searching scrutiny into the veracity of the witness, by all of those ingenious and pressing inquiries which the rules of evidence permit to be asked, and which the case itself and the testimony of the witness suggested. The cross-interrogatories answered by Madame Despau were filed by L. C. Duncan, J. J. Mercier, Z. M. Shepard, John Slidell, Julien Seghers, P. A. Zost, H. Lockett, and Isaaq T. Preston, Esquires.

It is worthy of notice, too, that the testimony of Madame Despau was taken three times, at long intervals. It is admitted that she does not contradict herself in any thing she said in her first examination, and that she did not afterward testify to more or less than she did at first. It was urged, however, against her credit, that the subsequent examinations were so frequently in the language of the first that she must have had copies of the latter, and merely repeated them, from which it might be inferred that she had been tampered with. But it was not intimated by whom, as a better discretion, in the absence of all proof of it, restrained counsel from giving personality to the insinuation, either as to the counsel of the complainant or herself. I have carefully compared the depositions in connection with the interrogatories and cross-interrogatories put to the witness, without having been able to find such an identity in her answers as might not very well have occurred from the sameness of the interrogatories, in each instance to a witness who is asked for a narrative of the same facts. Besides, her testimony was not orally given in court. It was taken by commission each time, long enough before the trial in the court below, for the considerate examination of counsel, who could have obviated what is now complained of by a motion to the court for an oral examination of the witness in court, which the judges would have granted if they had seen in the depositions any foundation for the charge; or, from any thing in them, the slightest indication that

the witness had been corrupted, or that the commissioners, [* 547] * in taking her testimony, had done so irregularly, by permitting her to use a copy of her first deposition. But the conclusive answer to the objection is, that the witness is sustained by other witnesses in all respects, except as to the fact of the marriage, of which she was a witness, and of which they were not, but which they swear was admitted to them by Mr. Clark. The next objection to the credit of the witness, and that most relied upon by the court for discrediting her testimony, and also that of her sister, Madame Caillavet, is, that neither of them, in giving the account of the pur-

pose for which Madame Despau and Zulime left New Orleans for New York, in 1801, tell that Zulime was then *enceinte* by Clark, and went there to be confined. There is no doubt that Zulime gave birth, in Philadelphia, during that absence from New Orleans, to the child known in the record maidenly as Caroline Clark, and afterwards as Mrs. Barnes. But as to the time of the birth of that child, there is nothing in the record conflicting with any probability against the declaration of Madame Despau, that it took place in 1801, notwithstanding the uncertain statement made by Mr. Coxe, of her birth having been in 1802, which last date has been used to show that Caroline was the child of Mr. Clark, and could not have been the child of Desgrange, on account of the latter's absence in France.

Before, however, a witness, as Madame Despau, will be discredited by an omission to state a fact of the kind mentioned, it is necessary to look at the interrogatories put to her by counsel on both sides of a cause, to determine if they called for such an answer either directly or indirectly, and that it had been purposely withheld. Or that the fact was in issue between the parties, and that a question to elicit it had been reluctantly answered by the witness. I have more than carefully examined the interrogatories which both Madame Despau and Madame Caillavet were asked to answer, without finding in any one of them any thing relating to the point, that Zulime left New Orleans to be confined at the north. And if there had been such a question, it would have been suppressed by the court on account of its irrelevancy to the issues between the parties as they are made by the bill and answers of the defendants. The fact of Zulime's confinement in Philadelphia is not in any way alluded to in either the bill or the answers, and though disclosed in the testimony of Mr. Coxe in the way it is, it cannot be used to discredit the witness, or to bear upon the subsequent marriage between Clark and Zulime, which is the point at issue, or have any other effect, if it should have any at all, than to show that Clark, according to the religious faith in which he was born, and according to the new laws of Louisiana, * encouraged by the canon law, and frequently [* 548] done under like circumstances, had determined to legitimate the child Caroline, *per subsequens matrimonium*, believing her to be his child. But there is nothing in the evidence of either of the aunts of the complainants, showing that either had wilfully suppressed Zulime's confinement, to the injury of the defendants, or with an intention to conceal it; or that they knew Caroline was the child of Clark, and not the child of Desgrange. Indeed, if the then law of Louisiana is to be decisive of the paternity of a child born during the marriage of parties, Caroline would be considered the child of Des-

grange, for as the time of her birth is not established, notwithstanding what is said to the contrary, on account of the differences between witnesses in respect to it, and the absence of Desgrange in its beginning being equally uncertain according to the proofs in the case, no inference can be drawn of such a time of absence, as precludes the possibility of access between husband and wife. Besides, as there is no proof in this case, when Desgrange sailed for France upon his mission to settle the Carrière estate, the first heard from him there being as late as the — July, 1801; in his letter to Mr. Clark, even allowing Mr. Coxe's conjecture to be certain, that Caroline was born in the spring of 1802, and not in 1801, as the other witnesses say she was, she would by the law of Louisiana at that time, be adjudged to be the child of Desgrange, as that declares a child born in ten months in wedlock to be legitimate. L. 4, tit. 33, p. 4; and there could be no legal foundation to exclude her from that paternity on account of the absence of Desgrange. In this point of view, the witnesses cannot be charged with the suppression of the fact of the confinement of Zulime in Philadelphia, and that was done to conceal from Desgrange that she had conceived and borne a child in his absence. They could neither have known the fact if it was so, nor had they any right to assert it contrary to the conclusion which is made by the law in such a case. They therefore are not liable to be discredited in that way, by connecting it with the ecclesiastical paper which the defendants offered as evidence in the case, of which I shall speak hereafter, both as to its inadmissibility as testimony, and its worthlessness to establish the validity of marriage between Desgrange and Zulime. In an inquiry to deprive a child born in wedlock of its legitimacy, on account of the non-access of the husband, the law requires certainty as to the time of absence, and without it, a child's filiation and its inheritance cannot be taken from it by any comparison of witnesses or inferences from evidence. In such a case there must be dates, not as to a day or a month, but that time enough has passed from the absence of the husband and birth of a child [* 549] to make it certain that he * could not have been the father of it. I will here in this connection give the testimony of Mr. Coxe, as that is principally relied upon to establish that Madame Despau had wilfully suppressed the fact of her sister's confinement in Philadelphia, and that upon that account she should be discredited. The fourteenth interrogatory, rec. 605, put to Mr. Coxe, is: Did Daniel Clark ever speak to you or write to you, about his relationship with Madame Desgrange, the reputed mother of the complainant Myra. If ay, state what that conversation was, the circumstances connected with it, and all about it. The answer will be found on

the 615th page of the record. "Daniel Clark did both write and speak to me about his relationship or connection with Madame Desgrange, the reputed mother of the complainant Myra. In the early part of the year 1802, Madame Desgrange presented herself to me, with a letter from Daniel Clark, introducing her to me, and informing me in confidence that the bearer of that letter, Madame Desgrange, was pregnant with a child by him, and requesting me as his friend to make suitable provision for her, and to place her under the care of a suitable physician; requesting me at the same time to furnish her with whatever money she might want and stand in need of, during her stay in Philadelphia. As the friend of Clark, I undertook to attend to his request, and did attend to it. I employed the late William Shippen, M. D., to attend to her during her confinement, and procured for her a nurse. Soon after the birth of the child, it was taken to the residence of its nurse. That child was called Caroline Clark, and at the request of Mr. Clark, the child was left under my general charge and exclusive care until the year 1811. After that period, she was not so exclusively under my charge, but I had a general charge of her, which continued up to the period of her marriage with Dr. Barnes, formerly of this city. She is now dead, as is also Dr. Shippen, before spoken of. Daniel Clark arrived in this city within a very short time after the birth of Caroline, which was, I believe, in April, 1802, when I received from him the expression of his wishes in reference to the child. He left here shortly afterwards, as before stated by me. During Daniel Clark's subsequent visits to Philadelphia, he always visited that child, acknowledged and caressed it as his own, and continued to give me the expression of his wishes in reference to her. On the occasion of Mr. Clark's visit to Philadelphia, immediately after the birth of Caroline, in conversation with me in reference to Madame Desgrange, he confirmed what he stated in his letter of introduction, stating to me that he was the father of this illegitimate child, Caroline, and that he wished me to take care of her, and to let the woman have what money she stood in need of until she returned to New Orleans." In Mr. * Coxe's [* 550] answers to subsequent interrogatories, he substantially repeats parts of the foregoing without addition, or any thing material besides. In his answers to the 20th, 21st, and 22d interrogatories, he recites the marriage of Zulime Née-Carrière with Dr. Gardette, in August, 1808, she having arrived from New Orleans in Philadelphia in the autumn of 1807. In his answer to the 27th interrogatory, he says: "I also think it proper to state, that in the year 1808, after Madame Desgrange had returned to Philadelphia from New Orleans, and when lodging in Walnut street, she sent for me, and during a

private interview with her, at Mrs. Rowan's, where she lodged, she stated that she had heard Mr. Clark was going to be married to Miss Caton, of Baltimore, which she said was in violation of his promise to marry her, and added that she now considered herself at liberty to connect herself in marriage with another person, alluding doubtless to Dr. Gardette, who, at the moment of the disclosure, entered the room, when, after a few words of general conversation, I withdrew, and her marriage to Mr. Gardette was announced in a few days after." Now, let it be remembered, that the point under discussion is not, whether Caroline is the child of Clark or Desgrange, but whether Madame Despau committed perjury in saying that she was one of the children of Desgrange, and that she purposely and corruptly concealed and withheld the fact of Zulime's confinement with Caroline in Philadelphia, from her apprehension of its influence upon the interest of the complainant, whose witness she was. Nor is it at all a dispute or doubt of Mr. Coxe's veracity. It is merely a question, and a very important one, too, of evidence, and the legal use which can be judicially made of it, altogether unconnected with the immorality of the persons disclosed in the record, with whom the complainant is unfortunately associated, only as to the legitimacy of her birth, and of whom personally she knew nothing in her bringing up, nor any thing since, beside those voluntary communications to her after her marriage, concerning her birth and paternity. made to enable her to receive her just rights in her father's estate.

By what principle, then, is it, I ask, or by what cases for authority to do so, is it, that the unsworn declarations of Clark, now repeated by Mr. Coxe, have been used to discredit Madame Despau's sworn evidence concerning a transaction in which Coxe discloses Clark to have been the criminal transgressor, and Madame Despau at most, only as the attendant of a frail sister to aid her in her travail, and to shelter her and her family from disgrace. There are those whom the weak, the unfortunate, and the wicked have natural claims upon, not disallowed by the law, and the discharge of which, without a violation of law, it does not even reproach. This is putting

[*551] the narrative of Mr. Coxe *in the strongest light against

Madame Despau, upon a presumption only, however, that she knew Caroline to be the child of Clark, and that she was not the child of Desgrange. I say knew,—apart from that intuitive perception, which is not evidence, which women have in other matters, and especially concerning such as we are speaking of, bringing them to a conclusion with the quickness of instinct, and which are only uncertainly reached by men, after a comparison of facts with the instincts of their own nature, without that of women to aid them.

The distinguished Sherlock says, without any satirical intention, or meaning to say that women are inferior to men: "Whilst she trusts her instinct she is scarcely ever deceived, and she is generally lost, when she begins to reason." And I need not tell my brethren, as evidence rests upon our faith in human testimony, as sanctioned by experience, that the conclusion of the great divine, is that of the law, and that the testimony of women is weighed with caution and allowances for them differently from that of men, but never with the slightest suspicion that they are not as truthful. Here, then, we have from Mr. Coxe, Clark's confession of an offence, subjecting him to stripes and the galleys, used to discredit a sworn witness guiltless of any offence against the law in relation to other facts, subsequently occurring as related by her, and who, as to the fact related by Mr. Coxe, may have been as much the victim of Clark's contrivance, as Zulime had been of his seduction. I make no theory, except in the sense of a theory resting upon facts; but may it not be probable, enough to relieve this witness from the imputation of having wilfully concealed the fact of Zulime's confinement, and her knowledge that Caroline was the child of Clark, that Clark, in the absence of Desgrange in France, arranged matters for her confinement, in Philadelphia, with the purpose also of having inquiries made concerning the validity of her marriage with Desgrange, or only pretendingly so, without communicating to the witness that he was the father of her sister's child, conceived, and to be born in Desgrange's absence, with the view of protecting both herself and its mother from disgrace, and both of them from prosecutions for their offence upon the return of the deluded husband. Concealment of its birth by the child having been left in Philadelphia, was obviously the motive of Clark and Zulime. When that was determined upon after the birth of Caroline, her filiation might have been obvious enough to the witness, but as there is no proof that it had been previously communicated to her by Clark or Zulime, it does not conflict at all with her declaration that the object of her going to the north with her sister was to procure proofs of the previous marriage of Desgrange. And if it be as it is said by those who *discredit her that Caroline was not [*552] born until June, 1802, there had been at the time of her departure from New Orleans no such development of Zulime's pregnancy, as necessarily to disclose it to her or any one else. It is in proof in the record, that the witness and Zulime left New Orleans in 1801, that Clark followed them, and was in Philadelphia before the expiration of that year, and for three months of 1802, or until some time in April. It is not unreasonable, then, when the credit of a witness depends upon the supposed concealment of a single fact, that

under such circumstances her ignorance of it should be implied until nature pregnantly disclosed it. Further, from Mr. Coxe's narrative, it does not appear that Madame Despau was ever present at his interviews with her sister, or that he ever had an interview with her. And it does appear that when Zulime delivered to him the letter of which he speaks, that Madame Despau was not present. It cannot, then, be assumed, as it has been, without further testimony to bring the knowledge of it home to her, that she knew any thing about that letter, or that Mr. Clark had said he was the father of Caroline, or of any of those arrangements made by Mr. Coxe for Zulime's confinement. Her purpose, then, for accompanying her sister to the north, as it is told by herself, ought to have been relied upon, because it is unaffected by any statement made by Mr. Coxe, of Clark's declarations to him. Madame Despau says she was at the birth of Caroline, and that it took place in 1801. This is all that she does say, which can connect her in any way with her sister's confinement with that child. Mr. Coxe is the only witness who says that the child was born in 1802, shortly after Mr. Clark's departure from Philadelphia. This is said with the qualification, to the best of his belief. Such an immaterial difference between two aged persons concerning a fact which took place more than forty years before they were testifying, cannot be used to discredit either, especially when both are before the court, in legal position equally entitled to credit. I will speak of the equality hereafter. Upon the testimony of Mr. Coxe, I make here a remark to show how little reliance can be put in his memory as to the time when Zulime presented to him the letter of which he speaks, or the time of Caroline's birth, or as to Clark's visits to Philadelphia, except that immediately preceding his departure for Europe. In his first examination, he did not state, I suppose he did not remember what he did state in his second, subsequently disclosed by his correspondence with Clark, that the latter had been in Philadelphia from late in 1801 to the last of April, 1802, all of which time Zulime was there, that it was in April that Clark returned to New Orleans and afterwards revisited Philadelphia in July, 1802, [* 553] Zulime being *still there, on his way to Europe. When he speaks, too, of the time of Caroline's birth, he does not do so with certainty, but only as he believes. There is, then, no cause for using any part of his testimony to discredit Madame Despau.

The next objection to Madame Despau's credit is made on account of her alleged want of character. It is said she was unchaste, and the defendants were allowed to put in proof a paper or record of a separation between herself and her husband, upon his prosecution for a divorce, upon which a judgment was given in his favor, which cut

her off on account of his charges of her infidelity, from any interest in the property which he had, to a part of which she would otherwise have been entitled. I confess my inability to see, even supposing it to have been altogether regular, as an adjudication in a competent tribunal, which it is not, how this paper was received as evidence in this case, either against the witness or against the complainant. I have expressed myself too moderately with respect to the character of this paper, but in vindicating what I believe to be the rule of evidence, I am anxious not to offend any one, and to keep myself within the strictest limits of judicial forbearance. I will not say one word by way of inference concerning it, but will appeal to the paper itself for the correctness of what I shall say. It cannot be used as evidence in this suit because it is *res inter alios acta*. It does not in any way affect the truthfulness of Madame Despau, and cannot be used to affect her character, except so far as every wife may be degraded in the public estimation, when she is charged by her husband, truly or not, with infidelity to her marriage vow. This paper itself discloses in terms, and not inferentially, every fact which I am about to state. It seems that Madame Despau and her husband lived unhappily, and had agreed to a divorce. Whilst the proceedings for it were pending, for the distribution of property, but after a decree had been made, her husband advertised the property for sale. She, by an application to the court, enjoined the sale, claiming that community in it to which she was entitled by the laws of Louisiana. The husband's answer asks the court to permit the property to be sold, and that he may be allowed to give bond to deposit the proceeds with a responsible person. The court allowed him to do so. In a year after this, the husband filed a petition, in which Madame Despau is charged with having left Louisiana for "some place in North America," without the consent of her husband, and that she is living in adultery. Supplemental affidavits were filed, declaring that Madame Despau had left the territory, and an affidavit in which it is said "her conduct had not been regular, and that her husband had reason to complain of her." In what respect is not stated. *Upon these *ex parte* affidavits, made [*554] without the service of any process upon Madame Despau, or any appearance by her or for her by any person, to the last petition of her husband, the court decreed that she had forfeited her community in the property, divorcing them *a mensâ et thoro*. The grounds of the decree were not stated. It certainly could not have been for proved adultery, there being no such evidence either general or particular against her. It does not become me to utter a word of reproach against the judge by whom that decree was given, but I

may say the decree itself, and the use of it in this case, show, whatever care may be taken to prevent irregularities in the trials of causes, that they sometimes occur to the great injury of parties, and to a want of confidence in the uniform correctness of judicial action.

But besides this paper, the defendants called witnesses to impeach the character of Madame Despau. I regret, too, that there was in this particular a disregard of all of those rules in respect to the impeachment of the credit or character of a witness. I do not remember a more marked departure from them. Before being more particular in this matter, I will state my judicial convictions of the manner of impeaching the character of a witness for veracity or for want of moral character, annexing judicial decisions, that it may be seen how far my views are sustained by authorities, and how much they were violated in this instance.

I understand that the credit of a witness may be impeached, 1. By the results of a cross-examination. 2. By witnesses called to disprove such of the facts stated by the witness, whether in his direct or cross-examination, as are material to the issue. 3. By evidence reflecting upon the character of the witness for veracity. Under this, the evidence must be confined to general reputation, and particular facts will not be permitted, for the law presumes every one to be capable of supporting the one, and that it is not likely that a witness, without notice, will be prepared to answer the other. *B. N. P.* 296, 297; *Rex v. Rookwood*, 13 *How. St. Tr.* 210, *Sir Thomas Trevor*, *Att. Gen. argu*; *Rex v. Layer*, 16 *How. St. Tr.* 285, *per Pratt, C. J.*; *Rex v. Rookwood*, 13 *How. St. Tr.* 211, *per Lord Holt*, who says the mischief of raising collateral issues would itself be a sufficient reason for the adoption of this rule. The regular mode of examining into the character of the person in question, is to ask the witness whether he knows his general reputation among his neighbors; what that reputation is, and whether from such knowledge he would believe him upon his oath. *Rex v. Watson*, 32 *How. St. Tr.* 495, 496; *Rex v. Delamotte*, 21 *How. St. Tr.* 811, *per Buller, J.*; *Mawson* [*555] *v. Hartsink*, 4 *Esp.* 103, 104, **per Lord Ellenborough*; *The People v. Mather*, 4 *Wend.* 257, 258; *The State v. Boswell*, 2 *Dev.* 209, 211; *Anon.* 1 *Hill, S. Car.* 258. These cases are cited from *Taylor on Evidence, &c. &c.* I do not think that the inquiry into the general character of a witness is restricted to his reputation for veracity, but that it may be made in general terms, involving entire moral character. On the other hand, notwithstanding the bad character of the witness in other respects, the witness deposing to that may be asked if the former has not preserved his reputation for truth. *Rex v. Rookwood*, 13 *How. St. Tr.* 211; *Carpenter v. Wall*, 11 *A*

& E. 803; Lord Stafford's case, 7 How. St. Tr. 1459, 1478; Sharp v. Scoging, Holt. N. P. 2, 541, Gibbs, C. J.; 1 Hill, 251, 258, 259; State v. Boswell, 2 Dev. (Law.) 209, 210; Hume v. Scott, 3 A. K. Marsh. 261, 262. But when it is attempted to impeach a witness on account of a want of moral character, it cannot be done by the impeaching witness "merely stating what he has heard others say, for those others may be but few. He must be able to state what is generally said of the person, by those among whom he dwells or with whom he is chiefly conversant, for it is this only which constitutes his general character." The impeaching witness, too, should be from the neighborhood of the individual whose character is in question. Boynton v. Kellogg, 3 Mass. 192, Parsons, C. J.; Wike v. Lightner, 11 Ser. & Rawle, 198, 200; Kimmel v. Kimmel, 3 ibid. 337, 338; Douglas v. Tousey, 2 Wend. 352; Mawson v. Hartsink, 4 Esp. 103, Lord Ellenborough.

It is scarcely necessary for me to say that when the general reputation of a witness has been impeached, that his credit may be established by cross-examining the witnesses who have spoken against him, as to their means of knowledge and the grounds of their opinion, or as to their own character and conduct, or by calling other witnesses to support the character of the first witness, or to attack in their turn the general reputation of the impeaching witnesses. 4 Esp. 103, 104; 2 Ph. Ev. 433. But no further witnesses can be called to attack the character of the last. In other words, a discrediting witness may himself be discredited by other witnesses, but there the recrimination must end. Lord Stafford's trial, 7 How. St. Tr. 1484. In this instance, the character of Madame Despau was most signally supported. I only now mention that another mode of impeaching a witness is by proof that other statements were made out of court contrary to what has been testified in court. No such attempt was made in respect to Madame Despau's statements. It will be seen directly that my particular statement of the rules for discrediting a witness is appropriate to the case. I now proceed to state what was said by those who were called to impeach

* the character of Madame Despau. Carraby says nothing [* 556] good was said of her; another witness, that her reputation was on the same footing as that of Madame Desgrange. Two others, the daughters of Gardette, place her on a footing with her sister Zulime; Courcelle says the same, and all say reports were unfavorable to Zulime. I have given the testimony of all of them who were introduced to impeach the character of Madame Despau. There was no attempt to impeach her credit except by assailing her for a want of character forty years before. Thirty-two witnesses

were called to support it. They knew her all of that time, several of them in her three different residences—to the hour when they deposed. All of them swear to her exemplary life and conduct in every place she had resided, and no one of them had found any thing with which to reproach her character or veracity. There is, perhaps, not another instance in our law cases, of a witness whose character has been so triumphantly lifted above every imputation of offence, and especially above the slanders of her husband, too readily received by the public, when he contrived, in her absence, judicially to rob her of her portion of his estate, and that, too, more than a year after they had been divorced *a mensâ et thoro*, which released her in every other particular as well as to residence, from all marital control. There has then been a signal failure in the attempt to discredit this witness on account of a want of character or veracity. The marked difference between the witnesses upon that point, is, that the few who impeach, do not swear positively as to what was generally said of her by those where she dwelt, and those who were called to sustain her general reputation do so, every one of them, without any qualification. Nay, more, they swear that in forty years' knowledge of her, that they had not heard her reproached by any, and that her life had been exemplary, particularly in the care she had taken of those children whom her husband had falsely said she had abandoned. Under such circumstances the defendants were precluded from insinuating, much less from insisting upon her want of character, and the weight of testimony excludes a different judicial conclusion.

In the different examinations of this witness, there were long intervals between them, without any variation in any particular but one. That is, that in her last examination she stated that there were circumstances which made her think the marriage between Clark and Zulime had taken place in 1802; and that she had previously said it took place in 1803. Such a difference might have been decisive against her veracity, had it been connected with any thing else in her testimony which made it probable that it was an alteration with an untruthful intention. * It was not pretended that such was the case, but for the purpose of raising a suspicion against her, it was intimated that she had learned from an interested source that the defendants could or had proved that Clark had not been in Philadelphia in 1803. Before such an insinuation can be regarded by the court as entitled to its notice, it must be shown that it has some foundation. It has been already said that her evidence did not furnish it. It is disclaimed that the complainant's counsel furnished the information, and was only so feebly suggested that it might have been done by the complainant, that both

the ethics of professional practice and the law discountenance such an attempt to prejudice a court or jury against a party in a cause upon its trial. But the difference in the depositions of the witness may be satisfactorily accounted for. She is speaking of the time of an occurrence which took place more than forty years before, in connection with its locality, the presence of the parties there, their return to New Orleans after it, the cause of their return in connection with transactions, the larger portion of which she relates correctly, which the defendants have proved happened in 1802. In respect to Clark's being in Philadelphia, and of his having followed the departure of herself and Zulime from New Orleans in 1801, she is confirmed by the proofs furnished by the defendants, which show that he was in Philadelphia when they were there for several months beginning in 1801 and extending to April, 1802, and also again in July, 1802, until he sailed for Europe in August of that year. In all of this the testimony of Mr. Coxe concurs, and that witness also speaks uncertainly as to time in several particulars, relating to Clark and Zulime, with the reserve and caution of old age concerning events happening in the middle time of life when it is engrossed in the cares and perplexities of business.

Hitherto, my object has been to show that Madame Despau cannot be discredited by any thing contradictory in her evidence, or by any thing offered exterior from it, or by any contradiction of her by any other witness. It is admitted by all of my brethren that there is no contradiction of herself in all of her examinations. No witness disproves any fact stated by her; her character for veracity rose above the attempt to assail her general reputation. It is not shown that she ever made statements out of court contrary to her testimony at the trial, and it is shown that the scandals against her, as they are reported by the witnesses of the defendant, are made more than improbable, by an exemplary life sustained there, and carried by her through forty years into a respected old age. I think that her testimony, corroborated as it is, in its most material particular, by four other witnesses, who are not impeached at all by circumstances in the case, or by any attempt to discredit them, [* 558] and two of whom the defendant's witnesses declare were men of standing and high character, prove the marriage between the complainant's mother and father as fully as such a transaction can be ascertained by proofs, and in the way which has always hitherto been adjudicated by courts, to be sufficient to establish marriage in cases of this kind. The corroborating evidence, are the statements of Madame Caillavet, that Clark made proposals of marriage for Zulime to her family, after her voluntary withdrawal from Des-

grange, upon her hearing that he had then a previous wife alive. That Clark acknowledged to her the marriage afterwards, and that Zulime did the same. The oath of Mrs. Harper, who nursed the complainant as the friend of her father, that Clark repeatedly acknowledged to her that Myra was his lawful child. The will which he made in her favor a short time before his death, which Mrs. Harper saw and read, in which he made Myra his universal legatee, terming her in it his lawful child. The proof by several witnesses that such a will was made by him, which no one can doubt whose mind is open to the proper bearing of testimony in ascertaining truth. His solicitude about that will and the object of it, when conscious that he was within the grasp of death without a hope of a reprieve, in that last moment of life here, when that which presses most upon the parting spirit, is revealed in its naked truth; Clark then said, that Myra was his legitimate child, that he had made her the successor of his whole estate. With dying words pointed out where the will would be found, and directed with all the earnestness of his condition, that it might be delivered as soon as he died, to him who had promised to be her tutor and guardian, to whose hands she was confided to be brought up in the rank and condition of her legitimate paternity, as the dearest and last object of her father's affection. Mrs. Smyth says that Clark always spoke of Myra to her as his legitimate daughter, before he made the will of 1813, then so describing her in the will, and afterwards in their conversation about her. This witness, in her answer to the tenth cross-interrogatory, gives the cause of the final separation between Clark and Zulime. It is, that when Mr. Clark was absent in Washington, individuals had, or supposed they had, a great interest in dissolving his connection with the mother of his child, commenced a plan of breaking it up, by writing to Mr. Clark imputations against her, and by filling her mind with unfavorable impressions against him, till at length his mind was so poisoned, that when he arrived in New Orleans she and he had a severe quarrel, and separated. She immediately after this left New Orleans. Madame Caillavet swears that she was not present at the marriage of Clark and Zulime, [* 559] * but says: "I do know that Clark made proposals of marriage for my sister, and subsequently Zulime wrote to me that she and Clark were married. Mr. Clark's proposals of marriage were made after it became known that her marriage with Mr. Desgrange was void, from the fact of his having then, and at the time of his marrying her, a living wife. These proposals were deferred being accepted, till the record proof of Desgrange's previous marriage could be obtained, and Zulime and Madame Despau sailed for the north of

the United States, to obtain the record proof. Mr. Clark acknowledged her to me as his lawful child." Pierre Baron Boisfontaine, after reciting with much minuteness, circumstances connected with the will of 1813, says, Clark spoke to him of Myra as his legitimate child, and in speaking to him of her mother, he says, "he spoke of her with great respect, and frequently told me after her marriage with Gardette, that he would have made his marriage with her public, if that barrier had not been made, and frequently lamented to me that this barrier had been made, but that she was blameless." Col. Bellechasse also says, that Clark repeatedly acknowledged to him that Myra was his legitimate child, and styled her in his will of 1813, his legitimate daughter. This witness also gives a very full account of the will of 1813. I have cited only so much of the testimony of these witnesses, as is confirmatory of the testimony of Madame Despau, in respect to the marriage of Clark with her sister, and of Clark's acknowledgment to others of his marriage with Zulime, and of their child's legitimacy.

And now it may well be asked, upon what rule of evidence it is, that the testimony of Mr. Coxe, standing as he does in this case, in the same legal relation as a witness, with Madame Despau, can be used to discredit both her and her sister, Madame Caillavet. There is no contradiction by him of any fact stated by them or either of them. No conflict between them in any one point, unless it be the differences between himself and Madame Despau, as to the time of the birth of Caroline, and the time of Mr. Clark's being in Philadelphia, in the last of 1801, until April, 1802, in which Madame Despau is confirmed by Mr. Clark's correspondence with Mr. Coxe, furnished by the latter for the defence in this case. Indeed, the witnesses, though speaking of the same persons, are testifying to different transactions in their history. Mr. Coxe to a connection between Mr. Clark and Zulime, founded upon Mr. Clark's declarations of it to him, and Zulime's acknowledgment by her delivery to him of Mr. Clark's letter, his assistance to her in consequence of it, his preparations for her delivery and the birth of Caroline, and Clark's subsequent recognition of that child as his; and Madame Despau, of a fact of marriage happening afterwards, Madame *Despau [* 560] being present at it; and Madame Caillavet stating that before it took place, Mr. Clark had made proposals of marriage to all of her family for Zulime, after her separation from Desgrange. Certainly, Mr. Coxe's opinions concerning the marriage, and his recital of Mr. Clark's courtships of another lady, years after it, when his relation to society had become changed, and there had been added to the notoriety of his commercial enterprise, something of

political consequence, ought not to be permitted to preponderate against witnesses who swear to the fact of marriage, Clark's subsequent acknowledgment of it when time and trouble had obscured his fancied greatness, and his repeated declarations to disinterested witnesses that Myra was his lawful child. But we shall see how this testimony of Mr. Coxe has been associated with a paper in this case, to give to it a bearing upon the evidence of Madame Despau and Madame Caillavet, without which they would not have been assailed, and with which it is, according to the rules of evidence, worthless.

Having concluded in my own mind that the evidence establishes the marriage between the father and mother of Mrs. Gaines, and that she is the child of their union, I proceed to the next most interesting point in the cause.

It is, that neither their marriage nor her birth will be available to establish the claim of Mrs. Gaines, because at the time when Clark married her mother she had then another husband alive. That marriage being admitted, and that Desgrange was alive when the marriage with Clark was solemnized, the objection will be sufficient, unless it can be removed. Upon the part of Mrs. Gaines, it is said, and I think is proved as the law requires it to be done, that her mother's marriage with Desgrange is as void on account of his having been a married man when he married her, as if there never had been such a relation between them.

The attitude of the parties in the cause is then this, that each charges a bigamy in support of their respective rights; with this difference, that the defendants do so for the twofold purpose of establishing the fact upon the mother of Mrs. Gaines, and from the nature of the testimony upon which they rely, to show that it also disproves the marriage between her and Clark. I will examine both; and, fearing that I may omit something, I will state the proofs upon which each party relies, after having stated the kind of proof which the law permits to be given in a civil suit, where bigamy is the point to be determined.

A charge of bigamy in a criminal prosecution, cannot be proved by any reputation of marriage; there must be proof of actual marriage before the accused can be convicted. But in a civil suit the confession of the bigamist will be sufficient when made under [* 561] *circumstances from which no objection to it as a confession can be implied. The proofs relied upon by Mrs. Gaines to establish the bigamy of Desgrange when he married her mother, are, his confessions of it to witnesses contemporary with the fact of their separation, more than a year before he was prosecuted for bigamy,

when it does not appear by any proof in the cause that he was menaced with a prosecution. To such confession is added his flight from New Orleans during the pendency of an inquiry against him for bigamy, and an adjudication afterwards upon his return to New Orleans, by a competent tribunal, in an inquiry into the validity of that marriage, at the suit of Zulime in her maiden name, in which judgment was given in her favor, and against him. In respect to the marriage of her father and mother, the complainant relies upon the proof of it by Madame Despau, who was present when it took place, upon the declaration of Madame Caillavet as to Clark's previous proposals of marriage to her family for her, their and her acceptance of them conditionally upon proof being obtained of Desgrange's previous marriage. Clark's admission of that marriage to several witnesses, as I have already shown, her father's conduct towards her from her birth to his death, his frequent acknowledgment of her legitimacy, the provisions of fortune which he made for her at different times, and the will which he made in her behalf, declaring her to be his legitimate child, and making her as such his universal legatee. On the other hand, the defendants rely upon the validity of Desgrange's marriage to Zulime, upon the secrecy of her intercourse with Clark, or of their alleged marriage, upon their not having lived in open cohabitation as man and wife, upon Clark's subsequent courtship of other females with offers of marriage, upon Zulime's marriage with Gardette in 1808, without any attempt to prove her marriage with Clark, or any application by her to dissolve it by legal means, or to enforce it with the proofs which she had of it, when she discovered his infidelity to her. They also rely upon certain papers to be found in the record.

The first of them is what they term an ecclesiastical record of a prosecution of Desgrange for bigamy, and a declaration in it imputed to the complainant's mother. The second paper is her suit against Desgrange for alimony, as late as the year 1805. The third is a suit brought by her guardian, Mr. Davis, in her infancy, against the executors of her father for aliment, and the fourth is a record of a court, properly authenticated, of a suit brought by Zulime in her maiden name against the name of Desgrange. This last was introduced by the defendants to show, as late as 1806, that the marriage with Desgrange had not been legally dissolved. And until it was, it is urged that there was *such an impediment in the way of [* 562] her marriage with Clark as to make that marriage null and void, the offspring of it illegitimate, especially so for the purposes of inheritance, even admitting that her filiation as the child of Clark had been established.

It has been said that the invalidity of a marriage in a civil suit, on account of those causes which make it void *ab initio*, particularly in the case of one void on account of the bigamy of one of the parties, may be proved by the admission of the fact by that party. It so happens in this case that Desgrange's admission of his bigamy, excluding his admission of it to Zulime's family for the present, is proved by a witness whose testimony has not been assailed and cannot be. Madame Benguerel has no connection with the family of the complainant, and her standing and character are such that the defendants could not impeach her credit on account of the want of either. She was subjected, too, to their cross-interrogation, and it brought out neither difference or contradiction of herself, nor any thing in the way in which she gave her testimony to subject her to any suspicion of friendship to the complainant or of any want of memory or uncertainty of her narrative. Madame Benguerel says: "My husband and myself were very intimate with Desgrange, and when we reproached him for his baseness in imposing upon Zulime, he endeavored to excuse himself by saying that at the time he married her, he had abandoned his lawful wife and never intended to see her again." In her answer to a cross-interrogatory put upon this point, she answers, I am not related to the defendants nor with either of them, nor with the mother of Myra, nor am I at all interested in this suit. It was in New Orleans where I obtained my information. It will be seen by my answers how I know the facts—I was well acquainted with Desgrange, and I knew the lawful wife of Desgrange whom he had married before imposing himself in marriage upon Zulime. Now let this evidence be taken in connection with the arrival of Barbara D'Orci, in New Orleans from France, contemporary with the return of Desgrange, and at his instance, and the antecedent connection between them as that is represented by both, and that there is in the record a certificate of a marriage between one Jacobus Desgrange and one Barbara Née D'Orci, in every other particular corresponding with the relation which these persons had been in, to each other in the year 1790, excepting in this, that Desgrange was afterwards known as Jerome and not as Jacobus, and it will be admitted that the facts just recited, with Madame Benguerel's evidence, are sufficient to establish the bigamy of Desgrange when he married the complainant's mother. Against this confession, what is urged? Nothing but the misapplication of the case [* 563] of Harman v. McClelland, 16 Louis. 26, *in which it was rightly ruled that in an application for a divorce, it would not be granted upon the confession of a husband and wife of adultery. The proof in the case also shows that Desgrange disappeared

from New Orleans in 1802, on account of the current charge that he was a bigamist, and whilst a prosecution of him was pending for that offence. There is also proof that he did not return to New Orleans until 1805, when Louisiana having become a portion of the United States, he could do so without liability to a renewal of an ecclesiastical criminal prosecution for bigamy or to the punishment inflicted by the provincial law for that offence.

But sufficient as such proof is to establish bigamy in a civil suit, the complainant adds it to record evidence of the fact of Desgrange having been a married man when he imposed himself upon her mother in marriage. The record and judgment of a court, of competent jurisdiction, was introduced by the defendants as a part of their proofs to show that there was a legal impediment in the way of Clark's marriage with Zulime when it occurred, and that continued up to 1806, when they allege that they were divorced. It was used for that purpose and much relied upon, and it was not until it was shown that the judgment in that case had relation back to the marriage, making it absolutely void *ab initio*, that it was urged that the record was of no account because a part of it was wanting. Here it is necessary to be particular. I cite from their answers their averments concerning that record. Upon page 58 of the record, the defendants introduce it in the following terms: "That afterwards, on or about the 24th of June, 1806, Zulime Née Carrière, wife of the said Desgrange, did present another petition to the competent judicial tribunal of the city of New Orleans, therein representing herself as the wife, and of having intermarried with Jerome Desgrange, and praying for a divorce and a dissolution of the bond of matrimony existing between her and the said Jerome Desgrange, and which was subsequently decreed, subsequent to the birth of the complainant, Myra; and for further answer, say that in the city of Philadelphia, on or about the 2d day of August, 1808, Mrs. Desgrange having obtained a divorce from her husband, Jerome Desgrange, and having resumed her maiden name, did enter into a contract of matrimony with and did intermarry with James Gardette." The preceding extract shows that the defendants not only use it to establish the fact of a divorce, but for the purpose of sustaining the rightfulness of Zulime's marriage with Gardette. Now if the record, imperfect though it may be, shows that the divorce could only have been decreed on account of the legal invalidity of the marriage with Desgrange, at the time of its occurrence, then, unless it can be shown that the law interposed an impediment * to marriage [* 564] in the way of the party imposed upon, until a sentence of nullity had been obtained, Zulime's marriage with Clark was a good

and valid marriage, though, for marrying without such a sentence, she may have subjected herself to the discipline of the church. It will be seen, before this opinion is closed, what the law is upon that point.

The deficiency in the record of divorce is the want of the petition. In every other particular it is perfect. So much so that it discloses the object of the petition, or the cause for which the suit was brought, and for which the judgment of the court was given.

It was introduced by the defendants, who allege that it was a decree of divorce, annulling the bonds of matrimony between Desgrange and Zulime, by a competent tribunal in New Orleans; record 58, 59, 216; and was so pleaded in their answers. When so introduced by them, and admitted by the court as admissible evidence, the complainants proved the loss of the petition, and the short manner of entering judgments in the court of which it was a record. 1206. I must here remark, though so brought forward by the defendants, that the majority of this court has rejected it from having any such effect.

At this point, then, my inquiries begin in opposition to the court's conclusion, as it has been announced by my learned brother. The points are, can we learn what is the effect of judgment without the petition? Can we ascertain the cause for which the judgment was rendered without the petition?

What is the effect of the judgment? It is one of a court of record having jurisdiction of the subject and over the parties to the suit. It annuls the bonds of matrimony—as the act of a competent tribunal the judgment must be presumed to have been rightfully rendered, until the contrary appears. This rule applies as well to every judgment or decree rendered in the various stages of a cause, from initiation of a suit to the final adjudication, affirming that the plaintiff either has or has not a right of action. 10 Pet. 472. The decree then had a legitimate cause until the contrary shall be shown. Now as the defendants plead this record to be true, averring it to be so upon their oaths, it cannot be further inquired into by the court, with a view to take from either party in the suit what it discloses. Its rejection by the court places its judgment in the remarkable and unexampled condition of denying to the complainant the benefit of the defendant's answer, as to a fact which they plead to be true. Further, it decides against the complainant, not upon the deficiency of her proofs, but by a denial of a fact, sworn to by the defendants to defeat the complainant's suit.

What but divorce, as contradistinguished from separation [* 565] *a mensa et thoro*, could have been the cause of the

suit? The witnesses, one and all of them say, that the bigamy of Desgrange, or his having been charged with it, induced Zulime to separate herself from him, and to return to her family.

But the cause assigned in the petition for the divorce may be satisfactorily made out, from the law of Louisiana as it then was, and from the rest of the record. Between 1803 and 1807, the United States territorial government of New Orleans, passed no law upon the subject of marriage and divorce. This judgment then in Zulime's suit could not have been founded upon any statutory enactment after the transfer of Louisiana to the United States. In the discussion of this point, in order that I may be better understood, that must be kept in mind. Then I say, that the laws of Spain as they were in the provincial condition of Louisiana, concerning marriage and divorce, and in every other respect, by the laws of nations, and by the act of congress of 1804,¹ organizing a government for New Orleans, remained in force there until legislatively repealed. Now, we learn from those laws, that they provided for sentences of the nullity of marriages and for divorces. From the same law, we learn that marriage could not take place, if there existed any canonical or civil impediment. 1 White, Recop. 44; Johnson's Civil Laws of Spain, 50. There are fourteen canonical impediments for which divorces were granted *a vinculo matrimonii*. In 1 M. & C. S. Partidas, 460, it is said there are fifteen, but upon the examination of the recital of them, it will be found there are substantially only fourteen, the last mentioned being only a prohibition subjecting the party to the discipline of the church, not extending to the dissolution of the marriage.

Canonical doctors express the fourteen impediments as I shall state them, which for all the purposes of this case, and for understanding them, will be found explained, though not in their order in the Partidas.

Error, conditio, v̄st̄um, cognatio, crimen,
Cultus, disparitas, vis, ordo, ligamen, honestas
Si sis affinis, si forte coire nequibis
Si parochi et duplicis desit, presentia testis
Raptave sit mulier, nec parti reddita tutæ.

The civil impediments are those which proceed from want of understanding, &c. &c., and from previous marriage, the wife or husband of the party contracting a second marriage being alive. For such causes as have just been stated, divorces could be granted *a vinculo matrimonii*. Such was the law of marriage and divorce of the Catholic church, so it is still, and it was the law of Louisiana

¹ 2 Stats. at Large, 283.

before its transfer to the United States, and afterward until [* 566] it was legislatively repealed, and by it the judgment * was given which divorced Zulime from Desgrange. For its continuance after the transfer of the territory to the United States, see 2 Story's Laws, 907,¹ and the act of the 3d March, 1805, 2 Story, 972,² expressly providing for "the continuance of the former laws of Louisiana, until repealed or modified by the territorial legislature."

With then the law in view, we are prepared to ask for what cause was the divorce sought by Zulime in her petition? We see, from the statement which has been made of the law, that it could not have been for a supervenient cause, and that it must have been for one antecedent to the marriage, which made it absolutely void from its beginning, notwithstanding all the forms of marriage had been observed. And what this cause alleged in the petition must have been, cannot be more conclusively shown than it is by the evidence in this case, and by the record of divorce, excluding all other enumerated causes of divorce *a vinculo*, excepting that of the bigamy of Desgrange. I shall state the evidence hereafter, keeping myself now to the point of the jurisdiction of the court in rendering a judgment of divorce. It having been shown that the provincial law of Louisiana was in force when the judgment upon Zulime's petition was given, it follows, as the county court of New Orleans was constituted with a civil jurisdiction, comprehending also what had been before exclusively ecclesiastical, that the court could only grant divorces *a vinculo*, for the same causes for which they could have been given by the ecclesiastical courts. Fortunately, the position just stated is that of the highest tribunals of this country, and in those of Louisiana expressly, when they have been called upon to decide what portion of the jurisdiction of the consistory courts for enforcing the canon law, appertained to our tribunals organized with civil jurisdiction. It follows then that the judgment of the county court upon Zulime's petition, defectively as that judgment is expressed, could only have been given upon a petition for a sentence of the nullity of the marriage between the petitioner and Desgrange. Thus with the guide of a settled principle in respect to the law of a country transferred from one dominion to another, until that law has been repealed, the purpose and object of the lost petition in Zulime's application for a sentence of the nullity of her marriage with Desgrange, is made out with as much certainty as if the petition had not been lost.

I think these results have been shown in respect to the judgment

¹ 2 Stats. at Large, 245.

² Ib. 331.

of the county court upon Zulime's petition for a sentence of the nullity of her marriage with Desgrange.

1. That the territorial government had not, when the county court gave the judgment, any statutes concerning marriage and divorce. 2. That the laws of Spain upon those subjects [* 567] were then in force. 3. That by such law a marriage between persons, either or both of whom had a lawful wife or husband alive, was void *ab initio*. 4. That the county court of New Orleans had a general civil jurisdiction, including the power to divorce, but that it could not divorce for a supervenient cause, and could only divorce *a vinculo*, for an impediment existing before the marriage, which made it dissoluble. 5. That having given such a judgment upon Zulime's petition against Desgrange, it relates back to its origin, and is *res adjudicata* controlling all other testimony in this cause, which has been given with a view of showing that Desgrange, when he married Zulime, did not commit bigamy.

I consider, then, that the complainant has established, by such proof as the law requires, that Desgrange committed the offence of bigamy when he married her mother; that she could legally disregard the connection and marry another person; that she did marry Clark, that the complainant is the only offspring of their union, and is entitled to her *legitime* in her father's estate.

I will here take another view of the record, to show that there is in it, complete and satisfactory secondary evidence of the object and purpose of the lost petition. The plea put in by the counsel of Desgrange affords a clew, not of itself entirely sufficient, but which, united with the other proceedings, make up what the law terms good secondary evidence of the contents of the petition. It is admitted or cannot be denied, that secondary evidence may be given to supply the loss. The plea denies the jurisdiction of the court over divorce cases, and then urges that the court could not consider the question of damages, until the validity of the marriage between the defendant and Zulime had been ascertained and declared, — validity of the marriage, it must be remembered. Can any thing show more plainly that its invalidity was the cause assigned in the petition. Again, the evidence in the record of the county court shows that Desgrange's bigamy in marrying the complainant's mother was the subject of her petition and of the court's inquiry. I take from the record of the county court a part of what, upon the trial of the case, the defendant introduces as his testimony, which the defendants in this suit have made theirs by the introduction of it. The witnesses speak of imputed bigamy to Desgrange, his flight on account of it, and his confession. In the county court, not one of them answers to any

thing else than to the inquiry, whether or not Desgrange had been married, and whether or not that wife was not alive when he married Zulime. One of the witnesses, and the most conclusive [* 568] that could be in such a case, * tells the cause of the suits, and no one disputed it. Besides, the suit is in the maiden name of the plaintiff against the name of Desgrange, and the cause is so entitled. Certainly, nothing more in the nature of secondary evidence can be wanting to establish the cause for which the divorce from Desgrange was sought. Yet there is more; for two witnesses swear that her suit was brought to get a sentence of the nullity of her marriage with Desgrange on account of his bigamy. I cannot but regard it as singular and unexampled, too, that any objection should have been made to the character and force of this paper on account of the deficiency of the petition after its introduction by the defendants to maintain an averment in their answers to the complainant's bill. It was introduced and used by the defendants to show that there had been a divorce between Zulime and Desgrange. The complainant could not object to its introduction as proof of an averment in the answer to her bill. It was good for what it was worth or for what it might disclose for or against either party in this suit. The complainant relied upon it, as her counsel may very well do, to establish the original invalidity of the marriage with Desgrange. The defendants relied upon it to show the lawfulness of Zulime's marriage with Gardette, and the improbability from that fact that Clark had ever married her. We have, then, the defendants' admission that the judgment of the county court was rendered for a cause which made the marriage with Desgrange void *ab initio*. To put, then, this record aside as nothing in the case, is a denial to the complainant of the benefit resulting from the action of the defendants, which in my view is a surprise entitling her to a rehearing of the cause by this court. It matters not whether the surprise has been caused by the action of the court and not by that of a party to the suit. The same right follows. In cases at common law a new trial would be granted, and in cases in chancery a rehearing will be given. If such secondary evidence shall not be deemed sufficient to make up for a lost paper, one, too, in this case which the complainant had every motive to produce, which she sought for in the office where it was, without success, but which the defendants subsequently obtained and made evidence, as they thought exclusively for themselves. Without regard to the want of the petition then, I cannot suppose that any thing less than a literal copy would satisfy those who have taken a different view of it from myself.

My views having been given upon the credit of Madame Despain,

and upon the testimony relating to the bigamy of Desgrange, I turn to that upon which the defendants rely to disprove it. Their first paper is termed the ecclesiastical proceedings in a prosecution against Desgrange, in 1802, for bigamy. * It will be [* 569] found at length in the opinion read by Mr. Justice Catron for the majority of the judges who sat in the trial of the cause.

It is not used to show that he was not a bigamist, for the paper contains only an interlocutory order, suspensive of further action, until the inquiry shall be resumed. But it is used, because it is said there is in this paper a declaration by Zulime of her disbelief of the charge against Desgrange, and that she was then his wife.

It is the misfortune of the complainant, that her case has been considered by the court with the rejection of the judicial proof of the bigamy of Desgrange, which is admitted to be admissible in evidence, and with the allowance against her of another paper, to which her counsel objected in the court below and here also, which in the way it was offered is not admissible. Two questions arise upon this paper: Is it an official register or record of a court, authenticated as it should be to make it testimony? What is its effect as testimony?

It has no other authentication of its genuineness than the declarations of Bishop Blanc and Father Kemper. The latter says, he is the keeper of the records of the Catholic church at New Orleans, and that the copy in the record is an exact copy of a paper found there, Rec. 577. The bishop says, he has the charge of such records of the bishopric as exists, and he finds among them a paper which is truly copied, Rec. 694.

* Under these certificates, this paper has been used by the court to rebut the parol proofs of the bigamy of Desgrange. The intention cannot be objected to, but rebutting testimony must have legal admissibility before it can be received in evidence. In this instance it is altogether wanting.

Public writings consist of the acts of public functionaries in the executive, legislative, and judicial departments of government, including, under such general head, the transactions which official persons are required to enter into books or registers, or to file, where books are not kept in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. To this class may be referred the acts of foreign states and the judgments of foreign courts.

Now this ecclesiastical record, as it is called, is either a transaction which official persons are required to keep, or it is the judgment of a foreign court. Whether one or the other, the certificates of the bishop and Father Kemper are not sufficient to make it testimony.

If it shall be said to be the first, before it can be received as an official register, it must be shown by the party offering it, to be one which the law required to be kept for the public benefit.

[* 570] * Such writings are admissible in evidence on account of their public nature, though their authenticity be not confirmed by the usual tests of truth; namely, the swearing and the cross-examination of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly because they are required by law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in them are entries of a public nature, it would often be difficult to prove them by means of sworn witnesses. The same rule prevails with respect to foreign and colonial registers. That is, copies of such foreign registers will only be admissible as proof where they are required to be kept by the law of the country to which they belong. Taylor on Evidence, 2, 1050. In *Huet v. Le Messurier*, 1 Cox, 275, a copy of a baptismal register in Guernsey was rejected, because it did not appear by what authority it was kept. In *Leader v. Barry*, 1 Espinasse, 353, and in *The Athlone Peerage*, 8 C. & Fin. 262, copies of the marriage register in the Swedish ambassador's chapel, at Paris, and a copy of the book kept at the British ambassador's hotel, in Paris, in which the ambassador's chaplain had made and subscribed entries of all marriages of British subjects celebrated by him, were rejected upon the same principle. The rule in its application is made more certain, for we find, contemporary with some of the cases mentioned, that an examined copy of a marriage register in Barbadoes was admitted, it expressly appearing that such a register was kept by the law of that colony. So a Jewish record of circumcision, kept at the Great Synagogue, in London, was rejected, though it was proved that the entries in it were in the handwriting of a deceased chief rabbi, whose duty it was to perform the rites of circumcision, and to make corresponding entries in the books. *Davis v. Lloyd*, 1 C. & Fin. 295, per Lord Denman & Patteson, JJ. When this last decision was made, its correctness was questioned by some members of the profession as not being reconcilable with the principles regulating the admission of the declaration of persons in the course of office or business. But it has not been judicially questioned, and is judicially considered to be a decision within the rule as to official registers, though there have been careless departures from it. The reasons for the rejection of the copy in that case, were, that the law did not require such a rec-

ord to be kept. That it did not appear how those entries were kept in the synagogue to secure them from false entries, or to whose custody they were exclusively officially confided. So also the birth, marriage, or * burial register, of any dissenting chapel [* 571] in England was rejected, until the act of 3 & 4 Vict. c. 92, provided for them to be received as evidence, when they have been deposited in the office of the registrar-general and entered in his list, pursuant to that act.

I have thus shown what the rule of evidence is in respect to public or official writings, from adjudicated cases. The same rule prevails in the courts of all the States of this Union, and has hitherto done so in the courts of the United States. In England, we have just seen, that the statute of 3 and 4 Vict. confirms it, by the provision which it makes in respect to the registers of dissenting chapels. In Louisiana, the rule is substantially the same as it is in the courts of the other States—the only difference being that it is better guarded, and has been put, in its application to cases there, upon a broader or more precise comprehension of the philosophy of evidence. This paper, under the decisions of the courts of that State, would not have been permitted to be evidence in the cause. Each State may regulate for itself the admission of such writings in evidence. Until it shall be done, the general rule must be in all of them as it has been, and it is binding in the courts of the United States.

It matters not that this paper is termed an ecclesiastical record. Such a designation gives it no authority over any other official register. It has the same force and no more than any other paper of the same kind would have from any other church or sect of Christians in our country. It stands upon the same footing as such a paper would, coming from the bishop and rector of an Episcopal church, or from any other denomination of Christians. All of them under our constitutions, — state and national, — being separately, according to the faith of each, upon an equality, and having the same legal protection from all tortious interference and disturbance. The rule for which I have been contending, induced me, in the consideration of this case, to reject the certificate of the marriage of Desgrange with Barbara D'Orci, introduced by the complainant. It is not sufficiently authenticated to make it evidence any more than the ecclesiastical paper is, — but it is as much so. And I should not have mentioned it at all, had it not been that this court, in making its decision, has used her declarations in that paper to show that Barbara and Desgrange were not married, though both admit they were engaged to be married, and that she left her father's house with that intention.

But I have not yet done with this paper. Fatiguing as it is to me to state all of the legal objections to its admissibility in evidence, I yield my own convenience to the importance of the rule for which I am contending, in some hope that what I write may attract professional attention, and prevent the disregard of it again.

[*572] *Before this paper with such certificates could be made evidence as an entry or file in the course of business or of office, it should have been shown that it was filed or entered contemporaneously with the act to which it relates. So strict is this rule to guard against impositions of papers as official registers, that requires, either where the original or a copy is offered, that it shall appear to have been made or entered contemporaneously with the transaction. Where several days had passed before the file or entry was made, the paper has always been rejected. I give the cases, comprehending, from the first to the last of them, a long time. *Price v. Torrington*, 1 Salk. 285; *Vance v. Fairis*, 2 Dall. 217; *Curren v. Crawford*, 4 Ser. & Rawle, 3, 5; *Ingraham v. Bockius*, 9 Ser. & Rawle, 285; *Forsythe v. Norcross*, 5 Watts, 432. And in *Walter v. Bollman*, 8 Watts, 544, the interval of a day between the transaction and the entry was held to be a sufficient objection.

Indeed, I do not know a rule of evidence which has been more uniformly adhered to than this has been. I regret that it should have been overlooked in this case, for I know it will be mischievously used, though I may not be able to anticipate the extent of mischief it may do. I take the rule to be this: that such registers must be promptly made, at least without such delay as to impair their credibility, and that they must be made by the person whose duty it is to make them, and in the mode required by law, if any has been prescribed. *Doe v. Bray*, 8 B. C. 813; *Walker v. Wingfield*, 18 Ves. 443. This ecclesiastical paper, now so much relied upon, and so fatally used against the complainant, has no one of the requisites to make it evidence. It has a date, but how it got among the records of the church, or when, or by whom it was put there, no one knows. I remember a case where the record of a baptism made by a minister before he had any connection with the parish, with the private memorandum of the clerk who was present at the ceremony, was rejected. It was not contemporaneous with the occurrence; but the clerk's memorandum was not enough. How far short this ecclesiastical paper is from having such proof to sustain it! I will now proceed to apply the rules of evidence as they have been stated, because it will show that more formidable objections exist to the use of this ecclesiastical paper than merely legal insufficiency of its authenticity.

It purports to contain the action of public authorities having a

criminal jurisdiction, before Louisiana was ceded to the United States. The presumption is, that it and other documents like it had a regular official depository. The defendants invoke it as such. It should then have been placed upon the transfer of the public papers of Louisiana with the authorities of the * United [* 573] States who were appointed to receive them. That, it seems, was not done. This paper, then, was retained by the civil or ecclesiastical authorities of Spain as one not included in such as were to be delivered up to the United States, but as one which might be left in the cathedral at New Orleans, although it was a public document. The latter being the fact, it is not unreasonable to ask, before it shall be used as an authentic document, upon the certificates of those who had no political connection then, with the cathedral of New Orleans, for some proof that this paper had been regularly derived from the authorities by whom it had been provincially kept, and that it had been faithfully and honestly preserved.

The Catholic church, in Spain, and the Spanish ecclesiastical authorities in New Orleans, had a political character, and did exercise an undefined jurisdiction in criminal matters of a certain description. And records may have been kept of its transactions.

But, since the cession of Louisiana to the United States, the Catholic society in New Orleans has not had any political connection with that institution. There has not been any regular association or hierarchy of Catholic Christians there, since the change of government. The cathedral church, formerly a part of that institution, became private upon the transfer of the province to the United States, whatever may be its voluntary ecclesiastical subordination to the church of which it was once a political part. This separation suggests at once the inquiry, what portion of the records and papers of the original Spanish hierarchy were transferred to the private and unrecognized body of American Catholics in New Orleans? Also, what measures were taken by them in their new relation to our government to preserve them from mutilation or from additions? Have there been in the cathedral of New Orleans regular keepers of these papers from the beginning of the political change in the condition of that church? None of these inquiries can be judicially assumed. Courts cannot recognize any private association of persons or sect of Christians as legitimately the successors of the political authorities of Spain, for the custody of documents of a public nature. If these records had been handed over by the bishop to his successor, or were considered as any part of those public archives which were to be transferred to the United States, proofs of such connection should have been made before the paper

in question could be received as evidence. There is no proof of any such connection, or that any thing of the kind was done. All that is proved about it is, that the present bishop has the charge of such papers as are to be found in the cathedral, without any [* 574] proof that they were regularly transmitted to * him by his predecessors or to any one of them who succeeded to the diocese after its separation from the authorities of Spain. Nothing, for the purpose of making this paper evidence, can be inferred from the fact that there is still in New Orleans a congregation of the same name and faith worshipping in the same building. The inquiries suggested cannot be taken upon trust. The pertinency of them must be obvious, when it is remembered that this paper has found its way into this case upon the oaths of the present incumbent of the cathedral, who is only thirty-two years of age, and of a prelate of recent accession to that dignity; neither of whom have spoken or can speak of the integrity of the papers of which they say they have the care, or of the manner they have been kept by their predecessors, or how they were derived from the ecclesiastical authorities of Spain.

I speak with a proper sense of the sacred characters which they fill, but I cannot judicially recognize them to be the successors of the public authorities of Spain in Louisiana for the custody of papers forming a part of its provincial judicial documents.

If the paper in question had been handed over officially to the predecessors of the bishop, or had been allowed inadvertently to continue among the archives of the cathedral, the bishop should have been called upon to prove all that he knew about it, before this paper was made evidence in this case. And so of any other that may be in the archives of the cathedral, and which may be hereafter offered as evidence in any other case. For all that appears this paper may have found its way irregularly and fraudulently into the archives of the church. No one proves that it formed a part of them at any time preceding the commencement of this suit. It had been repeatedly sought for without success. When found by the defendants, or for them, it was under circumstances which show that the papers of the cathedral have not been kept with care or regularity, or with any knowledge of what they were. What they now are, as a whole, is not known. They have neither been collated nor catalogued. What they were when the ecclesiastical authorities of Spain ceased to have a political existence in Louisiana, no one knows. The bishop speaks of them as being only a part of what once existed.

In this deficient condition of the archives of the cathedral, without knowing how it has happened, I cannot say that any paper has been

abstracted or fraudulently added, to serve such a purpose as this paper has done. But I can say, from the proofs in this cause, that the archives of the cathedral have been too negligently kept, for any paper in them of provincial date, to be received as evidence, without the most cautious scrutiny into its authenticity. The rules for the admission of public papers as *evidence must be [* 575] rigidly complied with in respect to them, or consequences may follow in Louisiana, which have not hitherto been anticipated. Comprehending, as they must do, notices of marriages, births, and deaths, they may be invoked to guide or disturb the descents of property, or to fix and unfix a relationship between persons differently from that which has been generally recognized. My object in what I have hitherto said, concerning this ecclesiastical paper, has been to show that it was not admissible in evidence either as an official register or a judicial proceeding.

I proceed now to show the misuse which has been made of it and its worthlessness as testimony.

It does not disprove Desgrange's admission that he was a married man when he married Zulime. It positively leaves him under a criminal prosecution for bigamy. The order given in it is not an acquittal. It suspends proceedings only for further investigation, and releases Desgrange from jail, because, up to that time, his guilt had not been proved. In other words, the evidence was thought sufficient to subject him to another trial, and not enough for a final judgment against or for him. Such is the paper. It cannot, then, be used for any other or larger purpose. The depositions which it contains cannot be made evidence in any case between other parties. The whole of the paper is an unfinished suit in which nothing was determined. It stands upon the same footing as other unconcluded prosecutions, where there has been a judgment of discontinuance, nonsuit, *nolle prosequi*, or the *ignoramus* of a bill by a grand jury. All of us know that the proofs taken in either of these cases cannot be used as evidence in another inquiry into the truth of facts at issue. They are excluded as well by the practice in Louisiana, as they are by the other state courts, and by those of England. Indeed, the rule excluding such proofs includes the exclusion of such as are annexed to judgments in a criminal prosecution. Such a judgment cannot be given in evidence in a civil action to establish the truth of the facts on which it was rendered, any more than a judgment in a civil action could be given for the same purpose in a criminal prosecution. I cite the cases, *Smith v. Rummens*, 1 Camp. 9; *Hathaway v. Barrow*, 1 Camp. 151; 2 C. M. & R. 139; *Jones v. White*, 1 Str. 68, B. N. P. 233; *Hillyard v. Grantham*, cited by Lord Hardwicke

in *Brownsword v. Edwards*, 2 Ves. Sen. 246; *Gibson v. McCarthy*, Cas. Temp. Hardw. 311; *Wilkinson v. Gordon*, 2 Add. 152; *Jamieson v. Leitch*, Miln. Eccle. Tr. Temp. Radcliffe, 690. These cases establish without a doubt, that this ecclesiastical paper ought not to have been admitted as evidence to affect in any way the right of the complainant.

[*576] *I will now notice another departure from the rules of evidence, in the use which has been made of one of the depositions in it, said to be Zulime's.

The rule is, that depositions taken in one cause may be used in another trial between the same parties, involving the same issues, if the witnesses are dead or absent. They have never been permitted, when the witness was alive and within the jurisdiction of the court. No case can be found in which it has been done before it was allowed in this, and this will never be cited as an authority for a different rule. The rule is the same everywhere. In no courts has it been more clearly affirmed than it has been in the courts of Louisiana. In *Hennen v. Munro*, 4 Mart. N. S. 449, it is said that a deposition of a witness taken in a former suit is admissible if he be dead or absent.

Here the fact in dispute was the bigamy of Desgrange. For that he was arraigned, and in fact tried. Among other depositions found in the proceedings, is one which it is said was made by Zulime. The object of the defendants was to use it, to show that she had admitted herself to be the wife of Desgrange, and had expressed her disbelief of his bigamy, after it is said she had married Clark. They were permitted to do so, though it was known to the court and to the parties, that Zulime was alive, and then within the jurisdiction of the court. Indeed, the defendants had joined in a commission to take her testimony. Why it was not executed does not satisfactorily appear. But that she was within the court's jurisdiction when this case was tried, and that it was known to the court and to the defendants, the record proves. The defendants then had no legal right to use a deposition which they ascribed to her, as having been made in a criminal proceeding more than forty years before. If her testimony was wanted for their defence, they ought to have made her a witness. They could have done so. There was nothing in her relation to the parties in this suit to prevent it. Had she been made a witness, and in her examination had made a different representation of facts from those attributed to her in the deposition, then would have occurred the question, whether the latter could be used to contradict and impeach her. The use of such depositions, is what is termed secondary evidence. In order to make them substitutes for

the *viva voce* testimony of the deponents, it is essential that they be regularly taken under legal proceedings duly pending, on an occasion sanctioned by law; and unless the case be provided for by statute, or by a rule of court, it must further appear that the witness cannot be personally produced. I give the rule as it is without meaning that the courts of the United States could make any such exception by a rule of court. But the rule, as I *have given [*577] it, is substantially admitted by the defendants, for they did not attempt to avail themselves of the deposition as evidence in their favor, until they had sought to make an apparent foundation for doing so, by an attempt to prove by a comparison of handwriting, that the signature to the deposition was Zulime's. It will attract the notice of the profession with some surprise, that experts should have been called to prove, by comparison, Zulime's signature to this deposition, when the proof concerning it could have been made by herself, with an explanation of all the attending circumstances.

But I pass on, as hastily as I can, to another objection to the use of this deposition, and one more interesting than those which have been already stated.

It is, that by the law of Louisiana, as it then was and still is, Zulime could not be a witness in the criminal prosecution against Desgrange, supposing her to be his wife, as the defendants assert her to have been. A husband may not be a witness for his wife, or the wife for the husband, in a criminal proceeding. A wife may impeach marriage to obtain a sentence of nullity; she may be a witness to certain facts in relation to those impediments deemed by law sufficient to annul the marriage. But neither by the civil nor canon law, or by the common law, can she be a witness for or against her husband, when he is prosecuted for any offence which the law punishes in his person. Nor can she be a witness in a prosecution of him for bigamy with herself, until after the relation of husband and wife has been proved not to be legal, on account of direct and positive proof of the husband's first marriage; then she may be a witness to prove the second marriage. I read from 1 Greenl. sect. 339, p. 409, this sentence: "Upon a trial for bigamy, the first marriage being proved and not controverted, the woman with whom the second marriage was had, is a competent witness, for the second marriage is void. But if the proof of the first marriage were doubtful, and the fact is controverted, it is conceded she would not be admitted. It is said in Cowen's Phillips, vol. 1, p. 79, ed. of 1849: on an indictment for a second marriage, though the first wife cannot be a witness, yet the second wife may after proof of the first marriage; after such proof she would be competent to give evidence for as well as against

the prisoner. Such was the law of Louisiana when Desgrange was prosecuted for bigamy, and when Zulime was forced into it as a witness. I know of but three exceptions to the incompetency of a wife to testify against a husband in a criminal case; they give to her ample security against his abuse. She is a competent witness in an inquiry against her husband, upon a charge which affects [* 578] her liberty or person. Such, for * instance, as a prosecution for a forcible marriage, though she may have cohabited with him. 2 Russ. 206; Wakefield's case, 4 How. S. T. 575; Hawkins, P. C., B. 1; C. 41, § 13: or she may be a witness for any gross injury committed on her person. Lord Audley's case, 1 S. T. 393; 3 How. S. T. 413: she may be a witness if he beats her, to protect herself from his future brutality. Such being the law, the deposition ascribed to Zulime in the prosecution against Desgrange, was illegally taken, and it cannot be used for any purpose relative, certainly not to affect the rights of third parties. What was the state of the prosecution when she was summoned to give testimony? There had been no proof of Desgrange's former marriage. There was proof of his having married her. She then stood, as far as that prosecution had been carried, as the wife of Desgrange. The vicar-general presiding in it, says, not being able to prove the report of Desgrange's bigamy, and having no more proofs for the present, let all proceedings be suspended. Under such circumstances, the mother of the complainant, then twenty-two years of age, was called upon to give testimony against Desgrange. He had imposed upon her, it is true. She had parted herself from him on account of it. But is it remarkable, being the father of two of her children then alive, that she should refuse, when forced to testify, to convict him of an offence, the punishment of which was stripes and the galleys? I represent the paper precisely as it is. The deposition of Zulime was illegally taken there; it is so here, and this court, in making up its opinion in this case, should not have considered it as admissible in evidence.

But in another view this deposition is good for nothing. It places Zulime in an inconsistent position with herself, and it is opposed by all the other proofs in this cause. Its utmost weight, in respect to her, is to diminish the force of her declaration, in respect to the filiation and legitimacy of her child, and that very remotely. Her acts and conduct are at variance with the deposition; the last was taken when she had been for some time separated from Desgrange, avowedly for his bigamy in marrying her. She had not lived with him for more than a year, and did not at any time afterwards live with him. When the prosecution of Desgrange began, she was living with her family. When Desgrange was released from prison, no steps

were taken by either for a reunion. He left New Orleans immediately upon his release from jail, and did not return to it until after the vicar-general's power to resume the prosecution against him had ceased, by the transfer of Louisiana to the United States. He is charged in the prosecution with an intention to leave New Orleans to avoid it. He did so instantly upon his release from * prison. He returned in three years; then the relations of [* 579] man and wife between them were not resumed, nor sought to be by either. On the contrary, as soon as it could be done, she prosecutes him in her maiden name, to be released from his name, and for a divorce. A judgment was given in her favor. The deposition ascribed to her neither proves nor disproves his bigamy. It means, and cannot be made to mean any thing else, than that Desgrange and herself had been married; that she had left him on account of reports of his bigamy; that she had not then been able to get proofs of it; that it then gave her no uneasiness; and that she had not heard, and did not believe, that he had three wives. In the condition in which she stood in that tribunal, shall what she there was induced to say to save Desgrange from disgraceful punishment, be relied upon to overturn and outweigh all the other evidence in the cause, of her marriage with Clark; his and her repeated confessions of it to witnesses, and his recognition of their offspring as his legitimate child? It is remarkable, too, that this deposition, as well as others in this ecclesiastical record, confirms all the facts related by Madame Despau. Her voyage from New Orleans to the north—the object of it—the time when it was made; the arrest and imprisonment of Desgrange for bigamy, his flight from New Orleans, though not in the way stated by her; the subsequent cohabitation of Clark and Zulime; that Clark and Zulime were in Philadelphia for several months, in the fall of 1801, and spring of 1802, under circumstances involving familiar relations and intercourse; that they thought there was a sufficient cause for them to keep the marriage secret, Clark having been told by counsel that a sentence of the nullity of Zulime's marriage with Desgrange must be obtained, before her marriage with him could be safely proclaimed. Both parties have repeatedly declared that they were secretly married. Clark, from the birth of the complainant, until he died, in all of his conduct to her, acted consistently with such a declaration. He frequently declared her to be his lawful child. No one doubts that he made a will, in which he proclaimed her to be so, making her his universal legatee, whatever may have become of that will after his death. Against all of this evidence, there is nothing but the deposition in the ecclesiastical record, which has been forced in evidence in this cause, contrary to law.

I will now briefly notice two other papers which the defendants were permitted to use as evidence in this cause in violation of every rule for its admission. One of them is the record of a suit for alimony, which, it is said, was brought by the mother of the complainant, against Desgrange, in 1805. The other is a proceeding [* 580] by Mr. Davis, the guardian of the complainant, * against the executors of Clark, for maintenance during her infancy, in which she is termed the natural child of Clark.

The petition in the first is in the usual formula to get such a case before the court, but the facts averred in it are not sworn to. It is signed by counsel in behalf of the petitioner, but without more to show that she had directed it, or that she was in any way informed of its contents. It is dated about the time of the complainant's birth. The object of the defendants, in introducing this paper, is to show that the mother of the complainant admitted herself in the petition to be the wife of Desgrange, three years after her alleged marriage with Clark. This cannot be done. Such a paper would not be admissible in a suit against Zulime herself. It cannot, then, be so in any other suit between other parties. The petition, in such a case, is not admissible in another suit against the petitioner, because, not being sworn to, its language is regarded as merely the suggestion of counsel, made for the purpose of bringing in a defendant to answer. An answer in chancery, put in under oath, is receivable against the party who swears to it; but that the narrative part of a bill in equity, or a declaration at common law can be used in another suit against the plaintiff in the first, has never been decided. The reverse has repeatedly been. It would certainly not do, in the artificial and technical modes in which rights are prosecuted in courts of justice, to make us answerable for the manner in which they are described or averred by counsel. If, then, the mother of Zulime would not be bound in another suit by what is stated in the petition of the paper in question, it must be admitted that the paper was erroneously used as evidence, to effect the rights of her child in this suit.

It is only necessary to say concerning the statement in the proceeding brought by Davis, that he denies upon oath that he authorized his counsel to say, that the complainant was the natural child of Clark.

I have now noticed every paper which has been brought into this suit as evidence. My views of each of them are sustained by cited authorities. They show that the ecclesiastical record, and every paper in connection with it, and the records for alimony, have been forced into this case as evidence for the defendants contrary to law.

Besides these papers, the defendants have no other evidence, to

gainsay the proofs which the complainant has given of her father's marriage with her mother, her right to marry him when she did so, on account of the bigamy of Desgrange. There is nothing in the record making it doubtful that her father and mother repeatedly acknowledged that she was their legitimate child. One witness,* and one only, was called by the defendants * to prove [* 581] that on one occasion Clark spoke of her to him as a natural child. That was De la Croix. He says that Clark spoke of her as such to him. His testimony cannot be allowed to outweigh Clark's declarations, to Bellechasse, Boisfontaine, and Mrs. Harper, that she was the lawful child of his marriage with her mother, especially when this was said to those witnesses, contemporarily with what De la Croix says Clark said to him, and to all of them for the same purpose. De la Croix says Clark told him so, when he asked him to become her tutor, and to be one of his executors to that will in which she was called his legitimate child and universal legatee. The other witnesses speak of the same time in connection with that will. De la Croix says he saw that will in its envelop; Mrs. Harper saw and read it. She swears that Clark spoke of her in it as his legitimate child and universal legatee. Clark spoke again of that will to his friends at his bedside in the last hour of his life. Their testimony is on the record. It is full, positive, direct, and particular, without any difference between them. The credit and character of those witnesses are unimpeached. The defendants attempted to assail them, but these witnesses examined for that purpose, one and all of them, declare that Bellechasse and Boisfontaine were persons of truth, honor, and standing. No one has attempted to assail the veracity of Mrs. Harper. De la Croix's statement must have been a misunderstanding of Clark's language. If not so, still, it must yield to the testimony of three witnesses, to each of whom Clark said at different times in connection with his will, that Myra was his legitimate child, and to two of whom he admitted his marriage with her mother.

There was but one way to get rid of the force of the complainant's evidence in support of her legitimacy. It was to assail the integrity of her witnesses. The way in which that was attempted, I have shown in respect to Mesdames Despau and Caillavet. It has succeeded with the majority of the judges who have tried this cause with me. But I feel authorized to say, that in all of my experience in the profession, I have never heard of witnesses so assailed before and upon such illegal testimony; not insufficient, but inadmissibly introduced into this cause for that purpose. My brother Daniel thinks as I do, and will express himself accordingly. Besides, these witnesses have been said to be unworthy of credit, when in the most

important particulars of their testimony, concerning Clark's marriage with the mother of the complainant, and of her legitimacy, they are confirmed by other disinterested witnesses to whom Clark admitted both; not once, but several times on different occasions. [* 582] These persons are strangers to the parties in this suit, *in all of those relations of life which might be supposed to incline them to favor either. They have not any connection with each other, except in those social relations which made them companions and the intimate friends of Clark. They have lived apart at remote distances for many years since the death of Clark, knowing nothing of his child, except as she was seen by them in her infancy, receiving publicly the caresses of her father, and hearing from him his acknowledgments that she was his legitimate child. Boisfontaine tells us, that Clark frequently told him, after Zulime's marriage with Gardette, that he would have made his marriage with her public, if that barrier had not been made, and frequently lamented to him that it had been made, but that she was blameless. But this witness shall speak for himself. His testimony is taken from the record without the change of a word.

" Court of Probate.

WILLIAM WALLACE WHITNEY, }
 and MYRA, his wife, }
 v.
 E. O'BEARNE, and others. }

Interrogatories to be propounded to witnesses on behalf of the complainants in this cause: —

1. Were you acquainted with the late Daniel Clark, deceased, of New Orleans; if so, were you at any time on terms of intimacy with him?

2. Did the said Daniel Clark leave, at his death, any child acknowledged by him as his own? If so, state the name of such child; whether said child is still living; and, if living, what name it now bears; as also state when and where and at what times said acknowledgment of said child was made.

3. Have you any knowledge of a will said to have been executed by said Clark, shortly before his decease; did you ever read or see the said will, or did Daniel Clark ever tell you that he was making said will, or had made said will? If so, at what time and place; and if more than once; state how often and when and where.

4. If you answer the last question affirmatively, state whether the said Daniel Clark ever declared to you, or to any one in your presence, the contents of the said will; and if so, state the whole of said

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declarations, and the time, place, and manner, in which they were made, before whom, and all the circumstances which occurred, when such declaration was made.

5. State how long before his death you saw the said Daniel * Clark for the last time; how long before his death he [* 583] spoke of his last will, and what he said in relation to his aforesaid child.

6. State whether you ever heard any one say he had read the said will; if so, state whom, what was said, and whether the said person is now living or not.

(Signed.)

WM. W. WORTHINGTON,
For Plaintiff.

Cross-Examined.

1. Each witness examined and answering any one of the foregoing interrogatories, is desired to state his name, age, residence, and employment; and whether he is in any manner connected with or related to any of the parties to the suit, or has any interest in the event of the same.

2. How long did you know Daniel Clark, and under what circumstances? And if you presume to state that Daniel Clark left any child at his decease, state who was the mother of said child, and who was the husband of that mother. State all the circumstances fully and in detail, and whether said Clark was ever married; and if so, to whom, when and where.

3. If said Clark ever acknowledged to you that he supposed himself to be the father of a child, state when and where he made such an acknowledgment, and all the circumstances of the recognition of such a child or children, and whether the act was public or private.

4. Did said Clark consider you as an intimate friend, to whom he might confide communications so confidential as those relating to his will? If ay, state what you know of your own personal knowledge of the contents of said will, and be careful to distinguish between what you state of your own knowledge, and what from hearsay.

The defendants propound the foregoing interrogatories with a full reservation of all legal exceptions to the interrogatories in chief, the same not being pertinent to the issue, and the last of said interrogatories being calculated merely to draw from the witnesses hearsay declarations.

(Signed.)

L. C. DUNCAN,
For Defendants.

In pursuance of the annexed commission, directed to me, the undersigned, justice of the peace, personally appeared Pierre Baron

Boisfontaine, who, being duly sworn to declare the truth, on the questions put to them in this cause, in answer to the foregoing interrogatories, says :—

1. In reply to the first interrogatory, he answers :—

I was acquainted with the late Daniel Clark, of New Orleans, and was many years intimate with him.

[* 584] *2. In reply to the second interrogatory, he answers :—

Mr. Clark left at his death a daughter named Myra, whom he acknowledged as his own before and after her birth, and as long as he lived. In my presence he spoke of the necessary preparation for her birth; in my presence asked my brother's wife to be present at her birth; and in my presence proposed to my sister and brother-in-law, Mr. S. B. Davis, that they should take care of her after her birth. After her birth, he acknowledged her to me as his own, constantly, and at various places. He was very fond of her, and seemed to take pleasure in talking to me about her. When he communicated to me that he was making his last will, he told me he should acknowledge her in it as his legitimate daughter. The day before he died, he spoke to me about her with great affection, and as being left his estate in his last will. The day he died, he spoke of her with the interest of a dying parent, as heir of his estate in his last will. She is still living, and is now the wife of William Wallace Whitney.

3. In reply to the third interrogatory, he answers :—

About fifteen days before Mr. Clark's death, I was present at his house, when he handed to Chevalier De la Croix a sealed packet, and told him that his last will was finished, and was in that sealed packet. About ten days before this, he had told me that it was done. Previous to this, commencing about four months before his death, he had often told me he was making his last will. He said this in conversations to me on the plantation, and at his house; and I heard him mention this subject at Judge Pitot's. I frequently dined at Judge Pitot's, with Mr. Clark, on Sundays. The day before he died, he told me that his last will was below in his office-room, in his little black case. The day he died, he mentioned his last will to me.

4. In reply to the fourth interrogatory, he answers :—

I was present at Mr. Clark's house, about fifteen days before his death, when he took from a small black case, a sealed packet, handed it to Chevalier De la Croix, and said, my last will is finished; it is in this sealed packet with valuable papers; as you consented, I have made you in it, tutor to my daughter. If any misfortune happens to me, will you do for her all you promised me; will you take her at once from Mr. Davis? I have given her all my estate in my will,

an annuity to my mother, and some legacies to friends; you, Pitot and Bellechasse, are the executors. About ten days before this, Mr. Clark, talking of Myra, said that his will was done. Previous to this, he often told me, commencing about four months before his death, that he was making his last will. In these conversations, he told me that in his will he should acknowledge his daughter Myra * as his legitimate daughter, and give her all his prop- [*585] erty. He told me that Chevalier De la Croix had consented to be her tutor in his will, and had promised, if he died before doing it, to go at once to the north, and take her from Mr. Davis; that she was to be educated in Europe. He told me that Chevalier De la Croix, Judge Pitot, and Colonel Bellechasse, were to be executors in his will. Two or three days before his death, I came to see Mr. Clark on plantation business; he told me he felt quite ill. I asked him if I should remain with him; he answered that he wished me to I went to the plantation to set things in order, that I might stay with Mr. Clark, and returned the same day to Mr. Clark, and stayed with him constantly till he died. The day before he died, Mr. Clark, speaking of his daughter Myra, told me that his last will was in his office-room below, in the little black case; that he could die contented, as he had insured his estate to her in the will. He mentioned his pleasure that he had made his mother comfortable by an annuity in it, and remembered some friends by legacies. He told me how well satisfied he was that Chevalier De la Croix, Judge Pitot, and Bellechasse, were executors in it, and Chevalier De la Croix, Myra's tutor. About two hours before his death, Mr. Clark showed strong feelings for said Myra, and told me that he wished his will to be taken to Chevalier De la Croix, as he was her tutor as well as one of the executors in it; and just afterwards Mr. Clark told Lubin, his confidential servant, to be sure, as soon as he died, to carry his little black case to Chevalier De la Croix. After this, and in a very short time before Mr. Clark died, I saw Mr. Relf take a bundle of keys from Mr. Clark's armoire, one of which, I believe, opened the little black case; I had seen Mr. Clark open it very often. After taking these keys from the armoire, Mr. Relf went below. When I went below I did not see Mr. Relf, and the office-room door was shut. Lubin told me that when Mr. Relf went down with the keys from the armoire, he followed, saw him then, on getting down, go into the office-room, and that Mr. Relf, on going into the office-room, locked the office-room door. Almost Mr. Clark's last words were that his last will must be taken care of on said Myra's account.

5. In reply to the fifth interrogatory, he answers: —

I was with Mr. Clark when he died; I was by him constantly for

the last two days of his life. About two hours before he died, he spoke of his last will and his daughter Myra, in connection, and almost his last words were about her, and that this will must be taken care of on her account.

6. In reply to the sixth interrogatory, he answers : —

When, after Mr. Clark's death, the disappearance of his [*586] last will was the subject of conversation, I related what

Mr. Clark told me about his last will in his last sickness. Judge Pitot and John Lynd told me that they read it not many days before Mr. Clark's last sickness; that its contents corresponded with what Mr. Clark had told me about it; that when they read, it was finished; was dated and signed by Mr. Clark; was an holographic will; was in Mr. Clark's handwriting; that in it he acknowledged the said Myra as his legitimate daughter, and bequeathed all his estate to her; gave an annuity to his mother, and legacies to some friends; the Chevalier De la Croix was tutor of said Myra, his daughter; Chevalier De la Croix, Colonel Bellechasse, Judge Pitot, were executors. Judge Pitot and John Lynd are dead. The wife of William Harper told me she read it. Colonel Bellechasse told me that Mr. Clark showed it to him not many days before his last sickness; that it was then finished. Colonel Bellechasse and the lady, who was Madame Harper, are living.

In reply to the first cross-interrogatory, he answers : —

My name is Pierre Baron Boisfontaine; my age about fifty-eight; I have been some time in Madisonville; the place of my family abode is near New Orleans, opposite side of the river; I was eight years in the British army; I was several years agent for Mr. Clark's plantations; since his death have been engaged in various objects; I now possess a house and lots, and derive my revenue from my slaves, cows, &c. I am in no manner connected with, or related to, any of the parties of this suit; I have no interest in this suit.

In reply to the second cross-interrogatory, he answers : —

I knew Daniel Clark between nine and ten years; I knew him as the father of Myra Clark; she was born in my house, and was put by Mr. Clark, when a few days old, with my sister and brother-in-law, Samuel B. Davis. I was Mr. Clark's agent for his various plantations; first, the Sligo and the Desert, then the Houmas, the Havana Point, and when he died, of the one he purchased of Stephen Henderson. He respected our misfortunes, knowing that our family was rich and of the highest standing in St. Domingo before the revolution. The mother of Myra Clark was a lady of the Carrière family. Not being present at any marriage, I can only declare it as my belief, Mr. Clark was her husband. To answer this question in

detail as is demanded, it is necessary that I state what was communicated to me. It was represented to me that this lady married Mr. Desgrange in good faith; but it was found out some time afterwards that he already had a living wife, when lady Neé Carrière separated from him. Mr. Clark, some time after this, married her at the north. When the time arrived for it to be made public, interested persons had produced a false state of things between [*587] them; and this lady being in Philadelphia and Mr. Clark not there, was persuaded by a lawyer employed, that her marriage with Mr. Clark was invalid; which believing, she married Monsieur Gardette. Some time afterwards, Mr. Clark lamented to me that this barrier to making his marriage public had been created. He spoke to me of his daughter, Myra Clark, from the first, as legitimate; and when he made known to me that he was making his last will, he said to me that he should declare her in it as his legitimate daughter. From the above I believe there was a marriage.

In reply to the third cross-interrogatory, he answers:—

Mr. Clark made no question on this subject before and after her birth, and as long as he lived he exercised the authority of a parent over her destiny. He was a very fond parent; he sustained the house of Mr. Davis and Mr. Harper, because my sister had her in care, and Mrs. Harper suckled her. He sustained Harper as long as he lived, and conferred great benefits on my brother-in-law. He spoke of her mother with great respect, and frequently told me, after her marriage with Mr. Gardette, that he would have made his marriage with her public if that barrier had not been made, and frequently lamented to me that this barrier had been made, but that she was blameless. He said he never would give Myra a stepmother. When, in 1813, he communicated to me that he was making his last will for her, he showed great sensibility as to her being declared legitimate in it. While I was with him at his death-sickness, and even at the moment he expired, he was in perfect possession of his senses; and no parent could have manifested greater affection than he did for her in that period. Nearly his last words were about her, and that his will must be taken care of on her account. She, the said Myra, is the only child Mr. Clark ever acknowledged to me to be his. She was born in July, 1805.

In reply to the fourth cross-interrogatory, he answers:—

I was a friend of that confidential character from the time of said Myra's birth. Mr. Clark treated me as a confidential friend in matters relating to her and his affairs generally.

In reply to the fourth cross-interrogatory:—

I have stated what I knew concerning Mr. Clark's last will. My

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recollection of these facts is distinct. The circumstances connected with them were of such a character that my recollection of them could not easily be impaired.

(Signed.)

P. BARON BOISFONTAINE.

Which answers, being reduced to writing, were sworn to and signed by the said witness in my presence; in testimony [* 588] whereof * I have hereunto affixed my hand and private seal, at the parish of St. Tammany, in the State of Louisiana, this twenty-seventh day of May, eighteen hundred and thirty-five.

(Signed.)

DAVID B. MORGAN,

Justice of the Peace. [L. s.]

A true copy of the commission for interrogatories (and answers thereto) propounded to Pierre Baron Boisfontaine on file in court of probates in and for the parish and city of New Orleans.

New Orleans, 20th April, 1840.

W. F. C. DUPLESSIS,
Register of Wills."

Bellechasse's testimony confirms that of Boisfontaine as to Clark's frequent acknowledgments that Myra was his legitimate daughter Mrs. Smyth, formerly Mrs. Harper, who nursed her, does the same. Each of them also speak with positiveness concerning the will of 1813. With three such witnesses to sustain them, I believe that Mesdames Despau and Caillavet have spoken the truth concerning Clark's marriage with Zulime. If they did not, the testimony of Bellechasse, Boisfontaine, and Mrs. Smyth is the most remarkable coincidence of truth with falsehood that has ever happened, and it can only be resisted by imputing to all of them a combination to perjure themselves for the same purpose. That no one has said or can believe. Bellechasse and Boisfontaine were brought into this case as witnesses, with characters of their own to command belief and respect. Neither of them can be doubted, for the defendant's witnesses who were brought to assail them, could only answer that both had always been honorable men. Mrs. Smyth's veracity has not been questioned in any way. I cannot then but believe that the paternity and legitimacy of Myra Clark Gaines has been fully established, as the law requires it to be done. There is nothing in the case opposed to it but those doubts and suspicions which will sometimes bear down truth, in its relation to the extraordinary realities of life. The history of Mrs. Gaines is one of them. It has been made more so by the result of her case in this court.

I will now notice two other points which were urged in the argument of this case.

It was said the complainant could not recover, even if it had been proved or was admitted that her father and mother were married, because there had not been, before that marriage took place, a sentence of the nullity of the marriage with Desgrange.

The other was, supposing Zulime to have been then free to marry, and that she did marry Clark, it was a clandestine marriage, *which has no civil effects according to the law of [* 589] Louisiana, to give to the issue a right of inheritance.

An inaccurate translation of the 4th Law, of the 20th Tit., of the 8th Book, of the Nueva Recopilacion, was cited in support of the first. It shall be given at length, followed by the original, and with what I believe to be a correct translation. Without doing so, the inapplication of the law to this case would not be seen.

The 8th Book, Tit. 20, Law 4, Nueva Recopilacion, as translated and cited, reads thus : " Should a woman, either married or even only publicly betrothed, before Our Holy Mother the Church, commit adultery, although she should allege and show that her marriage is null and void, either on account of near relationship by consanguinity, or affinity within the fourth degree, or because one of the spouses was previously bound by another marriage, or had made a vow of chastity, or was about entering a religious community or had some other reason — yet for all this she is not to be allowed to do what is forbidden ; and she cannot prevent her husband from bringing a suit for adultery, both against her and the adulterer, as if the marriage was not a true one. We decree against such persons, whom we consider as having committed adultery, (*que habemos por adulteros*,) the law of the *fuero* be strictly followed, which treats about adulterers, and is the first law of this title." See Nueva Rec., Book 8, Tit. 20, Law 4.

The original is as follows :—

LEY IIII. Que la desposada que comete adulterio, no se escusa por dezir que el matrimonio fue ninguno y no valio.

Si alguno muger estando con alguno casada, o desposada por palabras de presente en haz de la sancto madre Iglesia cometiere adulterio, que aunque se diga y prueue por algunas causas y razones q' el dicho matrimonio fue ninguno, hora por ser parientes en cõsanguinidad, o afinidad, dentro del quarto grado, hora porque qualquiera dellos sea obligado antes a otro matrimonio, o aya facho voto de estidad o de entrar en religion, o por otra cosa alguna, pues ya por ellos no q' do de fazer lo q' no deuia, q' por esto no se escusen a que el marido pueda acusar de adulterio, asi ala muger como al

[Don Fernando, y Doña Juana en las dichas leyes de toto. Cap. 31.]

adultero, como si el matrimonio fuesse verdadero. Y mandamos, q' enestas tales q' assi auemos por adulteros, y en sus bienes, se execute lo contenido en la ley del fuero de las leyes, que fabla de los que cometen de delicto de adulterior, que es la primera deste titulo.

[* 590]

* [Correct Translation.]

Law IV. *That the married woman who commits adultery, cannot excuse herself by saying that the matrimony was null and void.*

If any woman, being married to a man, or engaged by word *de presenti*, in the face of the holy mother church, shall commit adultery, and shall say and prove, by certain causes and reasons, that the said matrimony was null, either because the contracting parties were related by consanguinity or affinity within the fourth degree, or because either of them may have before contracted the obligation to marry another person, or may have made vow of chastity, or to enter into any religious order, or for some other reason, on which account they were not willing to do what they ought not to do, nevertheless these reasons are not such as to prevent the husband from accusing as well the wife as the adulterous man, the same as if the marriage had been valid. And we order that, with regard to these persons, whom we hold to be adulterers, and likewise with regard to their goods, there shall be executed what is prescribed in the law *fuero de las leyes*; which relates to those who commit the crime of adultery.

Recopilacion de las leyes, Libro VIII., Titulo XX., de las adulteros, incestos y esturpros.

I write diffidently upon such subjects, but not without due care. The result of my examination is, that the law just given has no bearing upon this case.

It has not so, in the first place, because the penalties to be imposed by it can only be applied to one who has been charged and convicted of adultery, upon an authorized accusation. By that is meant, such as the laws of Spain permit to be made against an adulterer or adulteress, only by certain persons, and within fixed times. The Spanish law for such a purpose is as fixed as is the punishment of the offence. It does not permit the charge to be made by any or every one. Certain persons are named who may make it, and another can only do so when the scandal has become notoriously offensive to public purity and morals.

I shall cite from the Institutes of Asso Y. Maniel, illustrated by Palacios, having the original work and Johnson's translation before me. And I do so because I find the translation introduced into

White's Recopilacion is frequently cited in Louisiana, and is so by one of the learned judges who sat in this case in the circuit court.

"While the marriage is not dissolved by the sentence of the church, the father, the adulteress, her brother, paternal and maternal uncles were legitimate accusers of the adulterer, and, for sixty days after a dissolution, either of them may accuse.

* Whilst the marriage continued, if the adultery is publicly scandalous, any one belonging to the town may accuse, and for four months afterward.

If the husband dies, the accusation may be made in six months after, computing from the day when the crime was committed.

So, whilst the married persons were united, five months were allowed for an accusation, unless force was used, and then the ravisher might be charged at any time within thirty years.

An accusation made after the times stated, might be avoided by the accused by such an exception. It was another available exception if the wife could prove she had committed the offence with the consent of her husband; so, if knowing the adultery, he continues to cohabit with his wife. Nor could he accuse after having said before the judge that he did not wish to accuse his wife. After accusation and an acquittal for want of proofs, the prosecution could not be renewed. A husband of bad habits and dissolute character could not accuse." I do not notice the note by Palacios to the text, from which the citation has just been made, because it does not particularly bear upon the point in question. *Palacios no recula ilus liz da; Tomo Segundo; Sep. Ed. 150.*

I have, however, been more particular in citing the law for such accusations, that it may be seen, as the mother of the complainant was never accused of adultery according to law, that she cannot be charged now with being an adulteress, to bring upon herself or her child any of the consequences which might have resulted to both, if she had been convicted under the 4th Law, in Title 20, of the 8th Book, of Nueva Recopilacion. But had she been so, the law *fuero de las leyes*, by which she would have been punished, does not declare a child that she may have had, illegitimate. That can only be done in another proceeding, in which it shall be proved that such child was the conception of an adulterous connection.

Further, a brief analysis of the law will show that it has no relation to the purpose for which it was cited.

It provides for five specific causes of canonical impediments for which a marriage may be invalidated or pronounced null, with a general provision for others of a like kind, without mentioning any civil disability for which a marriage is null and void, and declares

that a married woman, for such causes of canonical impediment, even though her marriage on account of them was not valid, should not prevent the husband of that invalid marriage from accusing her of adultery, and the person also with whom she may have offended.

And pronounces them adulterers "upon whom shall be executed [* 592] what is prescribed in the *law *fuero de las leyes*, which relates to those who commit the crime of adultery."

I mention the impediments in the order that they are in the case. Consanguinity or affinity within the 4th degree, a contract to marry another person, a vow of chastity, or one to enter into any religious order.

The error of the first translation is a misapprehension of the original in respect to the contract to marry another person. The words in the original are: "Hora porque qualquiera dellos sea obligado antes a otro matrimonio." They are rendered: "Or because one of the spouses was previously bound by another marriage." They should have been: "Or because either of them may have before contracted the obligation to marry another person."

The difference between the two is, that the mistranslation substitutes for a contract or obligation to marry, which does not excuse the woman from the charge of adultery, though it may make her marriage invalid, an actual marriage disregarded by her from her marriage with another, which is bigamy, and which being imputed to the complainant's mother, is said to make her illegitimate, because, when she married Clark, there had not been a sentence of the nullity of the marriage with Desgrange.

The law of which we are speaking is one which declares that certain criminal impediments to marriage, mentioning only some of them, shall not excuse a woman from being an adulteress, when she has been either "married or betrothed before the holy mother, the church." But bigamy is not an impediment in the sense in which that word is used canonically in respect to marriage. It is a civil objection, because one already married, and that marriage not being dissolved by death or the operation of law, neither of the parties to it can contract marriage with another without being guilty of the offence of bigamy, which is punished by the Spanish law as an offence, differently from what adultery is, and with the severest penalties. Had it been intended that a marriage with a bigamist should make a woman an adulteress, if, upon finding out the imposition upon her, she shall abandon the impostor and marry another, it would have been so declared. But that is not done, and therefore the 4th law of the 20th title of the 8th book of the Nueva Recopilacion cannot be applied in this case.

But there was in the argument a further misapprehension of the ecclesiastical law of Spain in respect to the cases of marriage for which sentence of nullity were necessary, before the marriage was considered as legally dissolved or only partially so for separation *a mensâ et thoro*. Such sentences were so, only in cases of canonical impediments, whether they were such as *made [* 593] the marriage void or voidable. But in the case of an objection to the validity of a marriage on account of a civil disability, and not a canonical impediment, no declaratory sentence of nullity is absolutely necessary. The most familiar instances of the last found in the books is, when, at the time of a second marriage, one of the parties had been previously legally married, and that marriage not dissolved by death or the operation of law. Such was the marriage of the complainant's mother with Desgrange.

In such cases, the marriage being void from its beginning, on account of the bigamy, it is not necessary that there should be a declaratory sentence of nullity to reinstate the party imposed upon in all the rights of a single person, or unmarried condition. Where there is bigamy, there is never a complete marriage, it being only an abuse of the forms of marriage in violation of the ecclesiastical and civil law, which declares "that marriage is null where either of the parties stand already married to another person, for, as one cannot be married to two persons at once, the marriage to the first being valid, the other must be void."

It is true, in such cases, the ecclesiastical court may be resorted to by the party imposed upon, to get a declaration from it that the marriage is void, but not on account of its being a matrimonial cause exclusively of ecclesiastical cognizance, because, as Palacios says, that the causes or trials of those who contract a second marriage during the life of the first wife, are by a royal circular of the 5th February, 1770, L. 10, tit. 28, lib. 12, Neu. Recop., declared exclusively of royal or lay and military jurisdictions, according to the persons who may offend; but that, by the royal decree of the 10th December, 1781, (which, however, does not appear in the Neu. Rec.,) the ecclesiastical jurisdiction may also take cognizance of the mode, and for the reason expressed by the same decree. White, Rec. 1, 46, note 28. But it is optional to the party to make such an application to the ecclesiastical court, and if it be done, the question of the validity of the marriage will be raised, and whatever sentence the court may give will be binding. But if convinced of the bigamy, the victim of it may voluntarily withdraw from cohabitation with the bigamist. For doing so, no penalty, ecclesiastical or otherwise, is incurred, nor any for marrying again without a sentence of the nullity of such vicious marriage.

It has, however, been suggested if, in a marriage void for bigamy, a party shall be allowed to withdraw from it, without a sentence of nullity being obtained, that the obligation of marriage will be impaired. The answer is, that experience shows the contrary, as the suit which is allowed in such cases for the restitution of [* 594] conjugal rights, at the instance of the party who has * been left, is sufficient to prevent such abuse, and to preserve the integrity of marriage. In such a suit, the husband or wife, as the case may be, alleges that the party proceeded against, has withdrawn from cohabitation, and asks that the defendant may be compelled to return to it. The process to compel an answer is vindicatory if the defendant is contumacious. When, however, the party answers, the marriage can be denied; or if there had been a valid marriage, other causes being sufficient to justify a separation *a mensâ et thoro*, can be pleaded in bar of the suit. If, in such a suit, the validity of the marriage is affirmed, the defendant is compelled to return to cohabitation. Again, the law for punishing bigamy prevents parties from marrying in such cases, unless the proof that it was committed against them is certain and conclusive.

In conclusion upon this point, the law declares that bigamy makes a marriage void as if it never had been, replaces the parties as they personally were before such a connection, and though it may be expedient to have a sentence of its nullity declared for the purpose of restoring rights of property, it is not necessary to enable the party imposed upon to marry again. Every thing concerning property or marital rights, when such a sentence has been given, returns *hinc inde* to its former condition. But the sentence in such cases is not a divorce or dissolution of the marriage, for that cannot be dissolved which was never contracted, but it is a declaration that it was null and void from the beginning, and that the party is free from any bond of marriage, and had and hath the liberty and freedom of marrying with another person. Not that, as a consequence of the sentence, the party has a right to marry another person, but had a right before the sentence of nullity was announced, on account of the marriage having been void from the beginning. Duchess of Cleveland's case against Fielding, in the arches court of Canterbury.

Such is the fixed form in ecclesiastical proceedings for a sentence of the nullity of a marriage on account of bigamy.

It now only remains for me to notice the other objection against the right of the complainant to recover. It is, that as the marriage of Clark with her mother was clandestine, that it illegitimizes her for the purposes of inheritance. I shall not speak of the general or particular consequences of clandestine marriages under the Spanish

law, as the facts of the case do not seem to me to make it pertinent. All that may have been said upon this point as to the effect of such a marriage in Louisiana, upon the parties and upon children, can have no influence upon the children of marriages validly contracted in another political sovereignty.

The objection assumes that the marriage of Clark and Zulime *in Philadelphia, in some way or other, but not [* 595] definitely stated, was subject on account of the domicile of the parties in Louisiana, to its laws prohibiting clandestine marriages. In other words, that a secret marriage lawfully contracted by persons *in transitu*, in a sovereignty in which such a marriage is not prohibited, will not give legitimacy to the offspring within the jurisdiction of the domicile of the parents, if it be kept secret there.

The right of persons to marry in every country where they may happen to be, is not denied, if there be no impediment there or in the condition of the parties in respect to the law of their domicile to prevent them from contracting marriage. Before, then, the validity of the marriage of the complainant's father with her mother in Philadelphia, can be denied, it must be shown that they could not contract it on account of a legal disability either there or in Louisiana. The first is not pretended. The only objection to it is that she was previously married to Desgrange. That cannot prevail, for I think it has been shown that Zulime's marriage was void on account of his bigamy in marrying her, and that she had the right, without any sentence of its nullity, to marry another, either in Louisiana or elsewhere. It is certain that in such a case of bigamy, she could marry again in Pennsylvania. Their offspring there would be legitimate. It cannot be made otherwise, because their child happened to be born in Louisiana. Legitimacy is the lawful consequence of lawful marriage, and it cannot be taken away by any subsequent misconduct of parents in respect to the marriage itself. Heirship, or the right of legitimate children to inherit from deceased parents, depends upon the law of the place where the property may be. Parents cannot change it, except as they may do so according to law. This being so, their misconduct cannot affect the right of a child to inherit or its legitimacy for such a purpose, though it may, in many particulars, affect their own rights as to each other, and as to their property. Concealment, in Louisiana, of a marriage elsewhere by persons domiciled there, might very well affect such rights, or the parties to it as relate to property parted with by either whilst they mutually concealed their marriage. But it would not do so because there was no marriage between them, but from their not holding themselves out to the community as man and wife. It is their duty to do that by the

ordinary *indicia* of the relation. If they do not, they must bear the consequences in respect to property and other matters which may concern them, from their misconduct. But as regards their children, as they are legitimate according to the *lex loci* of the marriage for all purposes, and to inherit that portion which the law gives [*596] them of the *estate of deceased parents, they cannot be affected in any way by their parents' concealment of their marriage, if it shall be proved to have been valid where it was contracted. The rule in such cases is, that where the marriage is valid by the *lex loci*, it will generally be held, not universally, valid everywhere for the purposes of inheritance. If invalid there, it will generally, not universally, be held invalid everywhere. But in either case, the exceptions grow out of law. They must be shown to exist as such before the right of heirship can be excluded.

The case of *Le Breton v. Noughet*, 3 Mart. 60, cited for a contrary purpose, is absolutely decisive of the reverse. It sustains, inferentially, the view of the right of the inheritance of children under a valid marriage contracted out of Louisiana, and directly, the right of the husband to a marital portion, though he violated the laws of Louisiana in running away with an heiress in her infancy to marry her in another sovereignty. The mother, too, of his wife, was declared to be her forced heir after the daughter's death, only because the latter left no child of her own. That case only decides this, that conjugal rights of property in cases of marriages out of the State of Louisiana, the parties being domiciled there, depend upon the laws of the domicile. That is strictly the case everywhere. But the filial right is not the conjugal. The law gives both, and both are protected and measured according to law.

Until it can be shown that there is a law of Louisiana excepting the child of a lawful marriage in Pennsylvania from the rights of heirship in the first, on account of the domicile of the parents at the time of such marriage, the child's right of inheritance cannot be denied.

I have searched in vain all of the codes of Spain and of Louisiana for such a law. I have earnestly sought in judgments of the courts both of Spain and Louisiana for such an one. Nothing can be found in either concerning such a proposition. I think, then, that I run no judicial risk in saying that there is nothing in the way of law to be found interfering with the right of Myra Clark Gaines to the heirship of such portion of her father's estate as the law of Louisiana gives to an only legitimate child.

Something was said that her right to recover was barred by the statutes of prescription of Louisiana. If her right under them shall

be measured by the proofs of the time of her birth, she is not barred. If from the time of the illegal disposition or sale of her father's estate by his executors, she is not so. If from the character in which she sues to establish a right of inheritance, there is no statute of prescription to bar her rights.

Those of us who have borne our part in the case will pass away. The case will live. Years hence, as well as now, [* 597] the profession will look to it for what has been ruled upon its merits, and also for the kind of testimony upon which these merits were decided. The majority of my brothers who give the judgment stand, as they well may do, upon their responsibility. I have placed myself alongside of them, humbly submitting to have any error into which I may have fallen corrected by our contemporaries and by our professional posterity.

The case itself presents thought for our philosophy, in its contemplation of all the business and domestic relations of life.

It shows the hollowness of those friendships formed between persons in the greediness of gain, seeking its gratification in a disregard of all those laws by which commerce can only be honestly and respectably pursued.

It shows how carelessness in business and secret partnerships to conduct it with others who are willing to run the risk of unlawful adventures, may give to the latter its spoils, and impoverish those whose capital alone gave consequence to the concern.

It shows how a mistaken confidence given to others by a man who dies rich, may be the cause of diverting his estate into an imputed insolvency, depriving every member of his family of any part of their inheritance.

We learn from it that long-continued favors may not be followed by any sympathy from those who receive them, for those who are dearest to our affections.

It shows if the ruffian takes life for the purse which he robs, that a dying man's agonies, soothed only by tears and prayers for the happiness of a child, may not arrest a fraudulent attempt to filch from her her name and fortune.

We can learn from it, too, that there is a kindred between virtue and lasting respectability in life; and that transgressions of its proprieties or irregular yieldings to our passions in forming the most interesting relation between human creatures, are most likely to make them miserable, and to bring ruin upon children.

I do not know from my own reasoning that the sins of parents are visited upon children, but my reason does not tell me that it may not be so. But I do know, from one of those rays shot from Sinai, that

Gaines v. Belf. 12 H.

it is said for the offence of idolatry: "I, the Lord God, am a jealous God, and visit the sins of the fathers upon the children unto the third and fourth generations of them that hate me, and show mercy unto thousands of those who love me and keep my commandments." It may be so for other offences. If it be, let the victim submissively recognize him who inflicts the chastisement, and it may be the beginning of a communion with our Maker, to raise the hope of a richer inheritance than this world can give or take away.

24 H. 558; 6 Wal. 642.

DECISIONS
OF THE
SUPREME COURT OF THE UNITED STATES.
DECEMBER TERM, 1851.

JUDGES DURING THE TIME OF THESE REPORTS.

HON. ROGER B. TANEY, CHIEF JUSTICE.	
HON. JOHN M'LEAN,	
HON. JAMES M. WAYNE,	
HON. JOHN CATRON,	
HON. JOHN M'KINLEY,	
HON. PETER V. DANIEL,	
HON. SAMUEL NELSON,	
HON. ROBERT C. GRIER, AND	
HON. BENJAMIN R. CURTIS,	
JOHN J. CRITTENDEN, Esq., ATTORNEY-GENERAL.	
WILLIAM THOMAS CARROLL, Esq., CLERK.	
BENJAMIN C. HOWARD, Esq., REPORTER.	
RICHARD WALLACH, Esq., MARSHAL.	

} ASSOCIATE JUSTICES.

THE UNITED STATES, Appellants, v. JOSEPH HUGHES.

13 H. 1.

Where a concession was made by the Spanish governor of Louisiana in 1799, and no survey was made and no possession taken, and no act done under it until it was produced in court in 1846; *held*, that the incipient title must be presumed to have been extinguished.

THE case is stated in the opinion of the court.

Crittenden, (attorney-general,) for the United States.

Jamin and *Taylor*, contra.

• NELSON, J., delivered the opinion of the court.

This is an appeal from the decree of the district court of the eastern district of Louisiana.

The plaintiff, Hughes, in the court below, filed a petition, founded upon a Spanish claim, under the act of 17th of June, 1844,¹ which revived the act of 26th of May, 1824,² for the purpose of recovering a tract of sixteen hundred arpens of land, situate in Louisiana, on the Atchafalaya River, near where the Point Coupée road crosses the said river.

The petition states that the concession was made to one Joseph Guidry, on the 1st of February, 1799, by Governor Gayoso, under whom the plaintiff derives title.

The proofs in the case show that the grant was made on the application of Guidry at the date mentioned; that he sold and assigned his interest in the same to one André Martin, at the risk of the purchaser, 19th of April, 1835, who assigned the same to the plaintiff, 1st of March, 1846, in pursuance of a contract made with his agent in 1840. The latter purchase was also made at the risk of the purchaser.

This concession was an incomplete grant, and did not vest a perfect title to the property in the grantee, according to the Spanish usages and regulations, until a survey was made by the proper official authority, and the party thus put in possession, together, also, with a compliance with other conditions, if contained in the grant, or in any general regulations respecting the disposition of the public domain. Possession, with definite and fixed boundaries, was essential to enable him to procure from the proper Spanish authority a complete title.

If, however, the concession itself contained a description of [* 3] the land sufficient to enable * the grantee to locate the same without the aid of a survey, the incipient grant, and possession thus taken, have always been regarded as such a severance of the tract from the public domain, as to entitle the grantee to a confirmation of the grant within the provisions of the act of 1824.

In such a case, there would be no discretion to be exercised by the public surveyor in putting the party in possession, which, under the Spanish usages, in disposing of the public land, was regarded as essential, in case of grants indefinite as to the location. The survey would be rather matter of form, than of substance, and might, therefore, very well be dispensed with.

In this case, the description in the grant is, perhaps, sufficiently specific to have enabled the grantee to take possession without the necessity of a survey; and, if possession had been taken in pursuance of the grant, he, or those claiming under him, would have pre-

¹ 5 Stats. at Large, 676.

² 4 Ib. 52.

sented a proper case for confirming the title under the act; and the decree of the court below in favor of the claim might well be sustained.

But no possession of the land was ever taken under this imperfect and incomplete grant, either during the existence of the Spanish government, or since the cession to the United States. Not only has no possession been taken, but, for aught that appears in the record, no action has been had, or claim set up, under the grant, during the whole of the period, from its date down to the institution of the suit, 16th of May, 1847.

Nor have we any proof of the actual existence of the grant, at all, until the 19th of April, 1835, when the grantee sold and quitclaimed his interest to Martin, under whom the plaintiff claims. No account has been given of it for the period of some thirty-six years. The plaintiff rests his claim exclusively upon the evidence of the signature of the governor to the concession, under date of 1st of February, 1779, and its production, 16th of May, 1846, before the court when the suit was commenced, together with the transfer from Guidry, the grantee, to Martin, in 1835, and from the latter to himself, in 1846; and this unconnected with any possession of the premises, or claim of right of possession to the same, in the mean time.

In view of this state of facts, it is impossible to deny, but that the claim comes before us under circumstances of very great suspicion; or to resist the conclusion that the grant, if made, had been abandoned. It is difficult to account for the neglect to take possession, or to set up any right or claim to the land for so long a period, upon any other supposition; especially, when we see that the description of the premises in the concession is sufficiently specific to have enabled the grantee to take possession under it without the aid of a previous survey.

*This conclusion is strengthened, when we take into view [* 4] the regulations of Governor Gayoso himself, who made the grant in question, respecting the disposition of public lands, published at New Orleans, 9th of September, 1797, about a year and a half before it was made. According to the 14th article, it is declared, that the settler shall forfeit the lands, if he fails to establish himself upon them within one year; and shall have put under labor ten arpens in every hundred, within three years. And in the regulations of the intendant, Morales, published at the same place, July 17, 1799, some six months after the date of this grant, possession, and cultivation, within a limited time after the concession, are expressly enjoined, under the penalty of forfeiture.

The neglect to comply with these regulations, thus positively en-

joined, within the three years that the Spanish government continued after the date of the grant, together with the absence of claim or assertion of right to the land, and absence even of any proof of the actual existence of the grant for the period of more than thirty-six years, we are of opinion, lay a foundation for the inference or presumption of abandonment of the original concession made by Gayoso, too strong to be resisted; at least, a presumption of abandonment that called for explanation on the part of the plaintiff, accounting for the neglect to take the possession, for the great delay in the assertion of the claim, and for the absence of any evidence of even the existence of the grant itself for so long a period of time.

On these grounds, we think, the decree of the court below erroneous, and should be reversed, proceedings remitted to the court below, and petition be dismissed.

13 H. 4. 7.

THE UNITED STATES, Appellants, v. JOSEPH HUGHES.

13 H. 4.

The previous decision affirmed, and applied to the facts of this case.

THE case is stated in the opinion of the court.

Crittenden, (attorney-general,) for the United States.

Janin and *Taylor*, contra.

[* 5] * NELSON, J., delivered the opinion of the court.

This is an appeal from a decree of the district court for the eastern district of Louisiana.

The plaintiff, Hughes, claimed in the court below 3,800 arpens of land situate in Louisiana, on the west bank of the Atchafalaya River, about one league above where the road from Opelousas to Point Coupée crosses said river under a concession from

[* 6] * Governor Gayoso to one André Martin, 10th of October, 1798.

The petition was presented to the district court on the 16th of June, 1846, under the act of 17th June, 1844,¹ reviving the act of 26th May, 1824,² praying for a confirmation of the grant in pursuance of the provisions of the act.

Evidence was given of the handwriting of Martin to the application to the governor for the grant of the tract in question; and of the handwriting of the governor to the grant.

The plaintiff, also, gave in evidence a conveyance by notarial act under date of 14th of July, 1848, purporting to be made by the heirs

¹ 5 Stats. at Large, 676.

² 4 Ib. 52.

of André Martin, the original grantee, to himself, conveying one thousand arpens, part of the tract of 3,800 arpens, to be taken off the front part of the tract.

Evidence was also given of a notice to the registers and receivers of the land-office at Opelousas, in Louisiana, of a claim on behalf of the heirs of Martin by their attorney, for confirmation of the claim under date 1st of February, 1837. What action took place before these officers on the application, if any, does not appear on the record, nor have we been referred to any proceedings therein.

There is no evidence that possession was ever taken of the land by the grantee, or any person claiming under him; nor of any claim of right to the possession; or of any right or title under the concession, or of the actual existence even of the concession itself, until the application to the register and receiver in 1837, a period of over thirty-eight years from its date.

Nor is there any evidence in the record accounting for the neglect to take possession, or for the absence of evidence of an assertion of right under the grant, or of even the existence of the grant itself for so long a period of time.

The plaintiff rests his claim exclusively upon the production, and proof of this incomplete grant by Governor Gayoso in 1798, of his title as derived from the grantee in 1848, and of the application to the officers of the land-office at Opelousas in 1837.

We have already held, in a previous case of this plaintiff and the United States, 13 How. 1, that the neglect to take possession, and the absence of any claim under the grant, and of any evidence even of the existence of the grant itself, for so long a period of time, afford such a violent presumption of abandonment of the claim, that unless explained to the satisfaction of the court, it is impossible, consistent with any sound principles of law or of equity, to uphold it. We refer to the opinion given in that case on this point as decisive of the present one.

There is also an additional objection to a recovery in this case, that did not exist in the one referred to. The plaintiff *shows no title to the land in question. There is no proof [* 7] in the record that the persons joining in the conveyance to him of the premises in July, 1848, were the heirs of Martin, the original grantee. The recital in the instrument is no evidence of the fact. The proper proof should have been furnished of the heirship.

For these reasons we are of opinion that the decree of the court below is erroneous, and should be reversed, and remit the proceedings to the court below, with directions to dismiss the petition.

United States v. Hughes. 13 H.

THE UNITED STATES, Appellants, v. JOSEPH HUGHES.

13 H. 7.

The two previous decisions affirmed, and applied to this case.

THE case is stated in the opinion of the court.

Crittenden, (attorney-general,) for the appellants.

Janin and *Taylor*, contra.

[* 8] * NELSON, J., delivered the opinion of the court.

This is an appeal from a decree of the district court of the eastern district of Louisiana.

The plaintiff claimed three thousand arpens of land situate in Louisiana, and fronting on the back part of lands of Oliver Thibodeaux, Theodore Thibodeaux, and Claude Martin, under a concession to André Martin from Governor Gayoso, 26th April, 1798. The proceedings were under the act of 17th June, 1844,¹ reviving the act of 26th May, 1824.*

Evidence was given of the handwriting of Martin to the application for the land, and of Governor Gayoso to the concession.

The plaintiff also produced evidence of a conveyance of the premises to himself by an instrument bearing date 14th July, 1848, purporting to have been executed by the heirs of André Martin the original grantee. And, also, notice to the register and receiver of the land-office at Opelousas, Louisiana, of an application on behalf of the heirs, by their attorney, for confirmation of the grant under date of 23d December, 1836.

The concession was an inchoate and incomplete grant; and there is no evidence that any possession was ever taken of the land, nor of any claim set up under the grant to the same, from its date down to 1836, when notice was given to the officers of the land-office; nor any evidence of the existence of the grant during the whole of this period. The case falls directly within the principles of the two previous cases (13 How. 1 & 4,) just decided.

There is, also, no proof of any title in the plaintiff derived from the original grantee. The conveyance purporting to be executed by the heirs, notwithstanding the recitals to that effect, furnishes no evidence of the fact of heirship.

We think the decree of the court below erroneous, and should be reversed; and that the proceedings be remitted to the court below, and the petition be dismissed.

¹ 5 Stats. at Large, 676.

² 4 Ib. 52.

THE UNITED STATES, Appellants, v. ARMAND PILLERIN and others
 THE UNITED STATES, Appellants, v. A. B. ROMAN; THE UNITED
 STATES, Appellants, v. CARLOS DE VILLEMONT'S Heirs and others;
 THE UNITED STATES, Appellants, v. JEAN B. LABRANCHE'S Heirs.

13 H. 9.

Grants made by the French authorities in Louisiana, after the date of the treaty of Fontainebleau, (8 Stats. at Large, 200,) held void, unless continued possession laid a foundation for presuming a confirmation by the authorities of Spain, in which case, as the titles would be complete and legal, a remedy is not afforded by the act of May 26, 1824, (4 Stats. at Large, 52,) but the titles are to be tried in the usual modes, under the laws and practice of the State.

Petitions dismissed without prejudice.

THE cases are stated in the opinion of the court.

Crittenden, (attorney-general,) for the appellants.

Janin and Taylor, contra.

* TANEY, C. J., delivered the opinion of the court. [* 9]

These four cases are all French grants made after the treaty of Fontainebleau by which Louisiana was ceded to Spain. We have already decided in the cases of *The United States v. Reynes*, 9 How. 127, and *The United States v. D'Auterive*, 10 How. 609, that grants of this description are void, unless confirmed by the Spanish authorities before the cession to the United States.

In some of these cases, evidence has been offered * of con- [* 10]
 tinued possession by the grantees of those claiming under them, ever since the grants were made. But if there has been such a continued possession, and acts of ownership over the land as would lay the foundation for presuming a confirmation by Spain of these grants, or of either of them, or any portion of either of them, such confirmation would amount to an absolute title, and not an inchoate or imperfect one. For all of the grants are absolute, or upon conditions subsequent; and if they had been originally made by competent authority, would have passed the legal title at the time, subject only to be divested by a breach of the condition, in the cases where a condition subsequent is annexed. Such a title, if afterwards recognized by the Spanish authorities, is protected by the treaty, and is independent of any legislation by congress, and requires no proceeding in a court of the United States to give it validity.

Titles of this description were not therefore embraced in the acts of 1824 and 1844,¹ under which these proceedings were had. These laws were passed to enable persons who had only an inchoate and equitable title, to obtain an absolute and legal one, by proceeding in

¹ 5 Stats. at Large, 676.

Crawford v. Points. 13 H.

the district court in the manner prescribed. And when the title under which the party claims, would be a complete and absolute one, if granted by competent authority or established by proof, the district courts have no jurisdiction under the acts of congress above mentioned to decide upon its validity. The act of 1824 is very clear upon this point; and it has always been so construed by this court.

Upon this ground the decree of the district court in each of these cases, is erroneous and must be reversed, and a mandate issued directing the petitions to be dismissed for want of jurisdiction.

But this decision is not to prejudice the rights of the respective petitioners, or either of them, in any suit where the absolute and legal title to these lands or any portion of them may be in question, or prevent them from showing, if they can, that the French grant was recognized as valid or confirmed by the Spanish authorities before the treaty of St. Ildefonso.

15 H. 36.

ALEXANDER CRAWFORD, Appellant, v. JAMES POINTS, Assignee in
Bankruptcy of HENRY HOTTLE.

13 H. 11.

An appeal does not lie to this court from a decree of a district court in bankruptcy.

Fultz, for the appellant.

Stuart, contra.

TANEY, C. J., delivered the opinion of the court.

This case may be disposed of in a few words.

James Points, the appellee, was appointed assignee of Henry Hottle, who had been declared a bankrupt, by the district court of the United States for the western district of Virginia. And, upon the petition of the assignee and the hearing of the parties concerned, certain settlements and transfers of property, made between the bankrupt and the appellant, were declared to be fraudulent, and set aside by the court. From this decree Crawford appealed to this court.

It is very clear that the appeal cannot be sustained. The appellant endeavors to support it, upon the ground that there is no act of congress now in force establishing a circuit court for the western district of Virginia. But, assuming this to be the case, it does not follow that an appeal to this court can be taken from the decree of the district court. For we can exercise no appellate power, unless it is conferred by law; and there is no act of congress authorizing an appeal to this court from the decision of a district court in a case of

Darrington v. The State Bank of Alabama. 13 H.

bankruptcy. It was so held in *Nelson v. Carland*, 1 How. 265, and in the case *ex parte Christy*, 3 How. 314, 315.

Indeed, if an appeal would lie from a final decree of the district court, this appeal cannot be maintained. For the decree is not final. An account is directed to be taken of the rents and profits of certain lands, with an option to the appellant to purchase them at a price named in the decree; and in that event he is to be discharged from the account for rents and profits. And, moreover, he is permitted to retain possession of certain slaves, until it should be ascertained whether the other assets of the bankrupt's estate would not be sufficient to pay *his debts; and an order to account [* 12] for their hire and the profits of their labor is suspended in the mean time. While these things remain to be done, the decree is not final, and no appeal from it would lie to this court, even if it had been the decree of a circuit court exercising its ordinary equity jurisdiction.

Upon either ground, therefore, this appeal cannot be maintained, and is, therefore, dismissed for want of jurisdiction.

2 Wal. 106.

JOHN DARRINGTON, LORENZO JAMES, and ROBERT D. JAMES, Plaintiffs
in Error, v. THE BRANCH OF THE BANK OF THE STATE OF ALA-
BAMA. JOHN DARRINGTON and LORENZO JAMES v. SAME.

13 H. 12.

Bills of a bank, incorporated by a State, managed by directors under its charter, having a capital stock actually paid in and liable for its debts, and subject to be sued for non payment, are not "bills of credit" issued by the State, though the State owns the entire stock, the legislature elects the directors, the faith of the State is pledged for the redemption of the bills, and they are made receivable in payment of all public dues.

If the highest court of a State in fact decides against the plaintiff, one of the questions enumerated in the 25th section of the judiciary act of 1789, a writ of error lies, although it may have disregarded one of its own rules of practice in making a decision.

THE case is stated in the opinion of the court.

John A. Campbell, for the plaintiffs.

Hopkins, contra.

*M'LEAN, J., delivered the opinion of the court. [* 13]

This is a writ of error to the supreme court of Alabama, under the 25th section of the act of 1789. ¹

An action was brought in the circuit court of Mobile county against the plaintiffs in error, by the commissioners and trustees of the banks

¹ 1 Stats. at Large, 85.

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of Alabama, under an act of the State, by serving a notice on them in behalf of the Branch of the Bank of the State of Alabama, at Mobile, as the makers of a promissory note expressly made payable and negotiable at the said Branch Bank, dated 2d of December, 1843, and in which they promised, twelve months after date, to pay the said Branch Bank by the name and description of Henry B. Halcomb, cashier, or bearer, the sum of four thousand dollars, with interest thereon from date, for value received, which said promissory note is regularly due and unpaid, and is the property of the bank.

The defendants below first pleaded *nil debet*, on which issue was joined.

In their second plea, they aver, that the consideration of the note sued for consisted of certain bills of credit issued by the [* 14] * State of Alabama, under the name and style of the Branch of the Bank of the State of Alabama, at Mobile, by which the State, under that name, promised to pay the bearer of the same on demand. That these bills of credit were for such sums as showed they were intended to be circulated as money. And that the object of the State was to circulate them as money, through the agency of the bank, for a profit.

The third plea avers that the note, on which suit is brought, was made and delivered to the plaintiff as a trustee for the State, and that the bills were received of the bank by the defendants, to put them into circulation as money for the profit of the State; that the bank was controlled by the State, and that it was alone liable for the issues made by the bank in the transaction stated.

The plaintiff below demurred to the defendant's pleas except the first one, which demurrer was sustained. And on a jury being called to try the issue, they found the amount of the note and interest for the plaintiff, on which judgment was entered. This judgment was taken by writ of error before the supreme court of Alabama, which affirmed the judgment. And this writ of error is now prosecuted in this court to reverse the judgment of affirmance.

It is argued that this case should be dismissed, as there was no special assignment of error in the supreme court of Alabama, as required by the law and the practice of that court.

The supreme court of Alabama exercised jurisdiction in the case, and affirmed the judgment of the circuit court. This court cannot look behind that judgment, and dismiss the cause here on the ground of a supposed violation of a rule of practice in the state court. Whether there was an assignment of error or not in that court, can be of no importance, as we look to the judgment only and its effects. But it may be proper to say there was an assignment of error in the

supreme court of Alabama, "that the court sustained the demurrer to the pleas, and gave judgment thereon in favor of the plaintiffs, whereas, by the law of the land, it should have been for the defendants."

The judgment on the demurrer in the circuit court was not formally entered, but the record states: "And the plaintiffs moved the court for judgment against the defendants, which was resisted by the defendants, and the plaintiff demurred to all the defendants' pleas except the first one, which demurrer was by the court sustained," &c.

The writ of error brought before the supreme court of Alabama the judgment of the circuit court as well on the demurrer as on the verdict of the jury, and the affirmance of the judgment extended to both. The pleas demurred to, raised the question whether the bills of the bank were bills of credit.

* Under certain restrictions, the constitution of Alabama [* 15] authorized the general assembly to establish a state bank, with such number of branches as they should from time to time deem expedient.

In 1823, the State Bank was established on the funds of the State, then in the treasury, and a loan obtained by an issue of state bonds. The preamble to the charter states: "Whereas it is deemed highly important to provide for the safe and profitable investment of such public funds as may now or hereafter be in possession of the State, and to secure to the community the benefits, as far as may be, of an extended and undepreciating currency; Be it enacted," &c.

In 1832, the bank at Mobile was established with a capital stock of two millions of dollars, procured from the sale of bonds of the State, created for that purpose.

By the charter, a president and fourteen directors were to be annually elected by the legislature, who were required to make a report to each session of the legislature. The corporation was authorized to issue notes of a denomination not less than one dollar, to discount notes and deal in bills of exchange, not exceeding certain amounts. The ordinary powers of a banking corporation were conferred, with a prohibition against owing debts exceeding twice the amount of the capital; and the directors were made personally responsible for any excess of indebtedment of the bank assented to by them. Until one half of the capital stock was deposited in specie, in its vaults, the corporation was not authorized to commence operations. The remedy for collecting debts was reciprocal for and against the bank. And the credit of the State was pledged for the ultimate redemption of the notes of the bank.

The State of Alabama was the only stockholder of the bank; but

it was placed under the control of directors elected by the legislature, and one half of the capital, amounting to the sum of one million of dollars, was in its vault for the redemption of its bills. With the means possessed by the bank when it commenced business, it required only prudent management to sustain its credit, and effectuate the objects for which it was established.

The bills issued by the bank were made payable on presentation to it, and they were signed by its president and cashier. The bills issued being convertible into specie by the holder, were current, and in all transactions were received and paid out, as equal in value to specie.

It is impossible to say that bills, thus issued, come within the definition of bills of credit. The agency constituted, not only managed the bank, but were made personally liable under certain [* 16] * circumstances. The directors, though elected by the legislature, performed their duties under the charter, and, like all other directors of banks, derived their powers and incurred their responsibilities from the law under which they acted.

It is not perceived that their action was not as free as those of directors who are elected by individual stockholders.

The promise to pay was made by the bank, and its credit gave to its bills circulation; they were in no respect, therefore, like a bill of credit. That must issue on the credit of the State. The principles laid down by this court in the case of *Briscoe v. The Bank of the Commonwealth of Kentucky*, apply to this case. 11 Pet. 331. In that case it is said: "To constitute a bill of credit within the constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State; and is so received and used in the ordinary business of life."

"The individual or committee who issue the bill must have the power to bind the State; they must act as agents, and of course do not incur any personal responsibility, nor impart, as individuals, any credit to the paper."

Did the pledge of the credit of the State in the charter of the bank, ultimately to redeem the notes of the bank, make them bills of credit?

The charter is a public law, and this court consider it as before them, the same as it was before the court of Alabama.

Upon the face of the bills there is no promise to pay, by the State, but an express promise by the bank. In this, there is an important difference between the notes of the bank and bills of credit. Whatever agency has been employed to issue a bill of credit, the State

promises to pay the bill, or to receive it in payment of public dues. And when a particular fund was designated out of which the bill should be paid, it depended upon the faith of the State, whether such fund should be so appropriated.

The bank had not only an ample fund for the redemption of its paper, but a summary mode was provided by which the payment of its bills could be legally enforced. And the directors were personally liable, if the issues of the bank exceeded twice the amount of its capital paid in. And besides the notes and bills of exchange taken on its discounts, enlarge the means of the bank, and increased the security of the bill-holders.

The charter of the bank gave to it all the means of credit with the public that banks usually have or could desire. That some reliance may have been placed on the guarantee, of the eventual payment of the notes of the bank by the State, may be admitted. But this was a liability altogether different from *that of a State [* 17] on a bill of credit. It was remote and contingent. And it could have been nothing more than a formal responsibility, if the bank had been properly conducted. No one received a bill of this bank with the expectation of its being paid by the State.

But it is said the State employed the bank as an agency, through which its bills should be circulated, for the profit of the State.

The State, as a stockholder, received a profit, if any profit was realized through the operations of the bank. But this is the condition of individual stockholders in all banks. And as well might it be said that the individual stockholders of a bank issue its notes, as that the State of Alabama issued the notes of the branch bank at Mobile.

A bank in either case acts under its corporate powers, and the directors derive their powers and incur their responsibilities under the law which governs them. The directors of the Mobile Bank, in the discharge of their duties, it would seem, were as independent as the directors of other banks.

A bill of credit emanates from the sovereignty of the State. It rests for its currency on the faith of the State pledged by a public law. The State cannot be sued ordinarily on such bill, nor its payment exacted against its will. There is no fund or property which the holder of the bill can reach by judicial process. Such an instrument is altogether different, in form and in substance, from the notes issued by the branch bank at Mobile. The fact that the State of Alabama may be sued by one of its citizens, does not alter the case. Such law may be repealed at pleasure, and if judgment could be obtained, payment of it could not be enforced.

The State, as a stockholder, held its property as a corporation or

 Ballance v. Forsyth. 13 H.

individual could hold it, in the Mobile Bank. The specie in its vaults, notes taken on discounts, and every description of property, managed by the directors of the bank, were subject to judicial process by its creditors. And in such a procedure the State, in its sovereign capacity, could not interfere. Its powers would be no greater than the powers of individual stockholders of a bank, under similar circumstances.

The affirmance of the judgment of the circuit court which sustained the demurrer to the pleas by the supreme court of Alabama, was right, and its judgment is, therefore, affirmed.

Grier, J., dissented.

15 H. 304.

CHARLES BALLANCE, Plaintiff in Error, v. ROBERT FORSYTH, LUCIEN DUMAIN, and ANTHONY R. BOVIS.

13 H. 18.

A patent which reserved the rights of settlers in the village of Peoria as granted by acts of May 15, 1820, (3 Stats. at Large, 605,) and March 3, 1823, (3 Stats. at Large, 786,) gave no title as against such a settler, who may recover the land, in an action of ejectment, against the patentee, though the settler's patent was of a subsequent date.

Where a tax was assessed on a whole fractional quarter section, embracing several village lots, and the sale for its non-payment was of an "acre off the east side," the sale was held void.

THE case is stated in the opinion of the court.

Ballance, for the plaintiff.

Gamble, contra.

[*20] *M'LEAN, J., delivered the opinion of the court.

This cause is brought before us, from the circuit court of the United States for the district of Illinois, by a writ of error.

It is an action of ejectment to recover the possession of three lots, numbered 47, 65, and 68, in the town of Peoria, under the act of congress of the 3d of March, 1823, entitled: "An act to confirm certain claims to lots in the village of Peoria." The claim 47 contains 27,449 square feet and seven hundredths; surveyed and designated as covered by claim 47, in the southeast fractional quarter of fractional section nine, in township eight, north of range eight, and east of the fourth principal meridian, &c.

[*21] *Lots 65 and 68 contain the same number of square feet, and, in fact, constitute but one lot, situated in the same fractional quarter section. Separate suits were brought for these

lots, but, being consolidated, they are included in one. The defendant below pleaded not guilty.

At the trial, exceptions were taken to the rulings of the court, which present the points of law to be decided.

The whole of the evidence was copied into the bill of exceptions, on which the court instructed the jury to find a verdict for the plaintiffs, as by law they were entitled to recover on the facts, to which instruction the defendant excepted.

The parties must have considered this case as a demurrer to the evidence, or as a special verdict. As there was evidence on both sides, some of which was conflicting, it could not be considered as strictly a demurrer to evidence. Nor was it strictly a special verdict, as the instruction was given before the jury found the facts.

From the whole of the evidence being set out in the bill of exceptions, we may suppose it to have been the intention of the parties to treat the facts as agreed or undisputed, in order that the law applicable to them might be pronounced by the court.

In sustaining the jurisdiction of this case, it is not to be considered as a precedent. It imposes a labor on the court which they are not bound to incur. But, as there seems to be not much difficulty in the facts, the court will decide the questions of law, as far as it shall be necessary to examine them.

By the act of the 15th of May, 1820, congress provided that every person, or the legal representative of every person, who claims a lot or lots in the village of Peoria, shall, on or before the 1st day of October next, deliver to the register of the land-office, for the district of Edwardsville, a notice of his claim, and the register was required to examine the evidence in support of the same, and report to the secretary of the treasury such as in his opinion should be confirmed; and the secretary was required to lay the same before congress for its determination.

On the 3d of March, 1823, an act was passed granting to each of the French and Canadian inhabitants, and other settlers in the village of Peoria, whose claims are ascertained in a report made by the register of the land-office at Edwardsville, in pursuance of the act of 1820, and who had settled a lot in the village prior to the 1st of January, 1813, &c., where the same shall not exceed two acres; and when the same shall exceed two acres, more than four acres shall not be confirmed. "Provided nothing in this act contained shall be so construed as to *affect the right, if any such [* 22] there be, of any other person or persons to the said lots, or any part of them, derived from the United States or any other source whatever, or as a pledge on the part of the United States to make good any deficiency," &c.

And, the surveyor of the public lands was required to survey the lots, designating those confirmed, which survey and plat were to be returned to the secretary, who was required to issue patents to the claimants. The surveys, it appears, were not executed for several years; but, at length, having been made and forwarded to Washington, a patent was issued to the legal representatives of Louis Le Boushier for lot No. 47, the 27th of March, 1847. The proviso in the act of 1823 was copied into the patent.

A plat was in evidence showing that lot No. 47 was situated in the southeast fractional quarter, section 9.

Testimony was introduced to show that this lot was inhabited by Le Boushier prior to 1813. On the 11th of December, 1836, Joseph Touchette and Madeline, his wife, who was the daughter of Le Boushier, and his only living child and heir, executed a deed to plaintiff for the above lot.

A patent was also read to Antoine Bourbonne, or to his legal representatives, dated the 16th of December, 1845, for lot 65, also covered by claim 68. By the recitals in this patent, it appeared that this claim had been presented to the register, at Edwardsville, and recommended by him for confirmation, on which the grant was issued under the act of 1823. A plat was introduced, showing the locality of this lot to be in the same fractional quarter section as No. 47, and also a description of its boundary.

A deed from Bourbonne to the plaintiffs was in evidence for the above lot, dated 16th September, 1836.

Charles Ballance was admitted to defend in the place of Lincoln, that suit having been consolidated with the one brought by the plaintiffs against Goudy for the other lot. Ballance admits himself to be in possession of lots No. 47 and 65-68, described in the declaration.

It was agreed that Ballance was in possession of that portion of said premises covered by lots one and two in block fifty-one, more than seven years before the commencement of this suit, by actual residence with his family thereon, up to 1845, and from that time by his tenants; and that portion of said premises northwest of Water street, in Bigelow and Underhill's addition to Peoria, was possessed more than seven years by the inclosure and cultivation of the same as a garden.

It was agreed that J. L. Bogardus, in 1832, was in possession of the southeast fractional quarter of section 9, township 8, [* 23] north of range 8, east of the fourth principal meridian, and continued in possession until 1834, when Isaac Underhill went into possession under Bogardus, and that Ballance was in pos-

session of the premises in dispute under title from Bogardus; neither of them resided on the premises, but had tenants.

On the 15th of November, 1837, Bogardus purchased the south-east fractional quarter of section No. 9. A deed for the same was made by Bogardus to Isaac Underhill, dated the 5th of August, 1834. On the 7th of July, 1841, Underhill and wife conveyed to Ballance lots Nos. 8, 9, and 7, in block No. 34, and lots 5 and 6, in block No. 38, in the above addition to the town. And, on the 1st of February, 1842, Underhill and wife conveyed to Ballance lot No. 3, in block 51, in the above addition to the town.

A record and proceeding of the county commissioners of Peoria county, showing that a tax was laid upon real property in the county, for 1843, and that such tax was imposed on the southwest and southeast quarters of said section, and that, on a return of the collector, that the owner had no personal property in the county out of which the taxes could be made, a judgment was rendered against the land by the circuit court, under the statute of Illinois, and an order was issued to the sheriff, directing him to sell the delinquent land to such person as should pay the tax for the smallest quantity of the tract.

And the defendant offered to read a deed from the sheriff on said tax sale to Charles Ballance, covering a part of lot No. 65, which was objected to by the plaintiffs, and the court sustained the objection, on the ground that the sale was contrary to law, to which decision the defendant excepted.

As there appears to have been no specific exception taken, and as we have not the opinion of the court, except that the evidence was defective, and could not sustain the tax title, we are left to conjecture as to the particular ground of the decision.

One acre of land was sold by the sheriff, "off of the east side of the southwest and southeast fractional quarters of section number nine," &c. In these two fractional quarters there appear to have been about 150 acres. It is not said in what form the acre was to be surveyed. Certainty, in such a case, is necessary to make the sale valid, for on the form of the acre, its value may chiefly depend. And there is nothing on the face of the deed or in the proceeding previous to the sale which supplies this defect.

It is singular that the land should be sold in the name of Ballance, and that he should become the purchaser; especially as he appears to have been in possession of the land as owner.

* Although the right of Bourbonne to lot 65 was recognized by the government, by the act of congress of 1823, yet, until the public surveyor marked the lines, its position and extent could not be ascertained. And it appears that this duty was neg-

lected by the public surveyor for many years. The patent was not issued until in 1845, two years after the tax was assessed. And it is not perceived how the specific lot could be taxed when its boundaries were not known. It seems to have been included in the southeast fractional quarter section, but it was not taxable as a part of that tract. Both the entry and the patent of Bogardus for the fractional quarter section contained an exception of the rights of all persons claiming under the act of congress of the 3d of March, 1823. So that the whole or any part of the lots claimed by the plaintiffs, which may have been included in either of the fractional quarter sections, both having the same exception, the claim to such lots was not affected by the patent. And, consequently, neither of the lots were liable to be sold for the taxes on the tracts which included them.

The court will not, unless fraud be shown, look behind the patents for the lots in controversy. That the patents cover the lots, as surveyed, seems not to be disputed. We cannot, therefore, in an action at law, inquire whether the lots, as originally claimed, are accurately described in the patents. The survey having been made by a public officer and sanctioned by the government, the legal title must be held to be in the patentee.

If the patent to Bogardus be of prior date, the reservation in the patent, and also in his entry, was sufficient notice that the title to those lots did not pass. And this exception is sufficiently shown by the acts of the government.

These lots were surveyed before the taxes were assessed for 1843; but the assessments were made on the fractional quarter section, without regard to the lots reserved. Such lots were neither assessed nor sold for the taxes due on them, and they were not liable for the taxes due on the quarter section.

That Ballance, being liable for the tax, should permit his own land to be sold, and purchase one of the lots, or a part of it, to pay the taxes on the larger tract, would seem to require explanation. Had a stranger purchased at this sale a part of the quarter sections, from the irregularity of the procedure, it is not perceived how the tax title could have been sustained. But, however this may be, we are clear that the sale of lot 65, or a part of it, under the circumstances, is void, and, consequently, that the sheriff's deed on such sale was properly rejected. As the whole law of the case seemed to have been submitted to the court, the deed, if admitted as *prima facie* evidence, could not have changed the result.

[* 25] The statute did not protect the possession of the defendant below. His patent excepted these lots; of course, he had no title under it, for the lots excepted.

The judgment of the circuit court is affirmed, with costs.

Doe v. Beebe. 13 H.

JOHN DOE, *Ex Dem.* HALLETT AND WALKER, Executors of JOSHUA KENNEDY, deceased, Plaintiffs in Error, v. ALFRED R. BEEBE, GEORGE W. HILLIARD, ALEXANDER M. CARR, CHARLES T. KETCHUM AND JOHN HORSFELDT.

13 H. 25.

Pollard v. Hagan, 23 How. 212, and Goodtitle v. Kibbe, 9 How. 477, affirmed and applied to this case.

THE case is stated in the opinion of the court.

J. A. Campbell, for the plaintiffs.

No counsel *contra*.

TANEY, C. J., delivered the opinion of the court.

This is an action of ejectment; and the plaintiffs in error claim title to the premises under a contract of sale made by Morales, the Spanish intendant at Pensacola, with a certain William McVoy, for twenty arpens of land on the west side of the River Mobile, bounding on the river; which contract was afterwards confirmed by an act of congress.¹

The contract with McVoy was made in 1806. He subsequently assigned his interest to William J. Kennedy and Joshua Kennedy, * and the latter became the sole owner by an [* 26] assignment from the former. An act of congress was passed in 1832, confirming the title of Joshua Kennedy upon two conditions: 1. That the confirmation should amount to nothing more than the relinquishment of the right of the United States at that time in the land; and 2. That the lands before that time sold by the United States, should not be comprehended within the act of confirmation. And in 1837, a patent was issued to Joshua Kennedy, reciting in full this act of congress under which it was granted.

It is admitted in the record, that the land in question was below high-water mark when the United States sold the land on which Fort Charlotte stood, in the town of Mobile. These lands were divided into lots and sold in 1820 and 1821, and patents were issued to the purchasers in the year last mentioned. The defendants made title to three of these lots, which bounded on the river, and it was admitted that at the time of the sale, high water extended over their eastern limits; and that the land now in controversy was reclaimed from the water and filled up by those under whom the defendants claimed.

The question, therefore, to be decided in this case is, whether the

¹ 6 Stats. at Large, 485.

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title obtained under McVoy's contract, confirmed by the act of congress in 1832; or the title obtained under the sale of the lots in 1820 and 1821, is the superior and better title.

The principles of law on which this question depends, have already been decided in this court in *Pollard v. Hagan*, 3 How. 212, and in *Goodtitle v. Kibbe*, 9 How. 477, 478. And according to the decisions in these two cases, the title under the sale of the lots is the superior one.

The judgment of the supreme court of the State of Alabama must therefore, be affirmed.

CYRUS H. McCORMICK, Appellant, CHARLES M. GRAY, and WILLIAM B. OGDEN.

13 H. 26.

On an arbitration between partners, held that they had appropriated a part of the assets of the firm, and that the arbitrator had not power to disturb that arrangement.

Partners have the right, as between themselves, to control the possession of their assets, and appropriate them to the payment of claims by one partner on the firm.

Though one part of an award may sometimes be good and another part bad, the part allowed to stand must appear to be in no way affected by the departure of the referee from the submission.

THE case is stated in the opinion of the court.

Johnson, for the plaintiff.

Butterfield, contra.

[* 35] CURTIS, J., delivered the opinion of the court.

This is a bill for an account of certain partnership transactions between McCormick and Gray, and to set aside an award by which that account has been stated. The bill was demurred to, and by a decree of the circuit court of the United States for the district of Illinois, it was dismissed, and the complainant appealed.

The demurrer raises the question, whether the award is valid? The objection to the award is, that it is not pursuant to the submission. To decide this question, it is necessary to examine the terms of the submission and the award. The submission is contained in arbitration bonds, mutually executed by the parties, bearing date on the 20th day of December, 1848, submitting, generally, all their partnership and other differences with this limitation: "Provided, that the award so to be made by said arbitrator shall not in any way alter or affect the demands of property and assets in the hands of William B. Ogden, as the trustee of said parties, or the agreements between said parties, relative to the collection and disposition of said demands,

assets, and property; but the same shall remain under the provisions of said contract."

This clause in the submission refers to an assignment of the principal part of the *choses in action* of the partnership, in trust *to collect them, made by the partners before the execution [* 36] of the submission bonds, which assignment recites the fact of the submission, and contains agreements as to marshalling this part of the partnership assets. Amongst other trusts declared in this assignment are the following:—

"1. Said Ogden shall proceed to collect said assets as speedily as may be; and, after first paying all expenses, costs, and commissions attending the collection and disbursement of the same, he shall pay over to said McCormick the sum of \$14,610, on account of patent fees due him for the manufacture of said Virginia Reapers, as aforesaid.

"2. To pay all legal liabilities and debts of said McCormick and Gray as they shall become due.

"3. The balance of said assets, as fast as collected, shall be paid in *pro rata* sums as follows: to said McCormick, one half of all moneys collected; to Ogden and Jones, one fourth part of said moneys, being the amount heretofore sold and assigned by said Gray to them; and the remaining one fourth part to said Charles M. Gray. Provided, however, and it is hereby expressly understood and agreed between the said McCormick and Gray, that the respective sums herein provided by this clause, to be paid to said McCormick and Gray, respectively, shall be retained by the said Ogden, to await the award of Judge Dickey, in the submission above referred to, and shall in no case be paid over by him to either of said parties until said award shall be made; and when said award shall be made, in case it shall be made against either party, the amount of such award shall be taken out of the moneys going to the party against whom said award shall be made, and paid over to the amount thereof, to the party in whose favor said award shall be made; and when said award shall have been paid, the balance of said moneys going to said McCormick and Gray, if any there shall be, shall be paid over to them, respectively, in the proportion hereinbefore provided for. Provided, further, that, if said Gray shall not pay to said McCormick, within thirty days from the date hereof, the sum of \$2,500, on account of the indebtedness of Gray and Warner to said McCormick, then the said Ogden shall retain and pay over to said McCormick, out of the rest of the moneys to be paid to said Gray, as aforesaid, after first paying any award which said judge may make in the submission above mentioned, against said Gray, the aforesaid sum of \$2,500, on account of the said indebtedness of said Gray and

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Warner, aforesaid, together with ten per cent. damage thereon, as a penalty for any delinquency on the part of said Gray, to pay said sum of \$2,500 within the time above limited, every thing hereinbefore contained to the contrary notwithstanding; and the [* 37] said Gray agrees *to furnish the said McCormick, within the thirty days aforesaid, a full, true, and correct account or statement of the indebtedness of said Gray and Warner to said McCormick; and any excess over and above the said sum of \$2,500, which said account or statement shall show to be due to said McCormick, shall also be paid to him by said Gray, within the thirty days above limited, or, in default thereof, the said Ogden shall pay the same out of the same funds, in the same manner and with the like penalty that the said sum of \$2,500 is hereinbefore provided to be paid."

These stipulations, by which this part of the partnership assets is disposed of, are, in legal effect, incorporated into the submission, and limit the authority of the arbitrator. He could do nothing to alter or affect them. But, instead of observing this limitation, his award treats the entire property of the partnership, and the respective rights of the partners, as if no such agreements had been made.

He postpones the payment of the \$14,610 to McCormick, for his patent fees to the payment of the debts of the firm, though the agreement of the parties was, that it should be first paid out of the *choses in action* assigned. It is argued, that this was justified by the prior right of creditors. But, as between the partners, they had a perfect right to control the possession of the partnership funds, and determine that the whole, or any part, should go into the possession of either partner. Both are ultimately liable for the debts, and whether one or other member of the firm shall have possession of the funds, either under a claim as a creditor of the firm, or otherwise, while they act in good faith, is a matter wholly subject to their control. Indeed, it is only through them, and by means of their equity to have the partnership property applied to the payment of the partnership debts, that creditors have any lien on, or specific rights to, the property of the firm, as distinguished from the property of its members. *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Fell, 10 Ves. 347; *Ex parte* Williams, 11 Ves. 5.

This partnership was solvent, and the object of the submission was to adjust the relative rights of the partners. The payment of the debts, and a provision for them out of the partnership funds, was probably necessary, in order to make a final settlement, without recourse over, in consequence of payments compulsorily made by one partner, which might disturb the balance between himself and his

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copartner. But it certainly was not within the authority of the referee to make this provision out of a fund which the partners had otherwise disposed of by an express agreement, which they made part of * the submission, and which constituted a limitation [* 38] on his authority.

It is said that, by the terms of the agreement between the parties contained in the assignment, these debts were to be paid as they should become due, and that, to support the award, the court will intend they were all payable at the time it was made. But if this were intended, the agreement would nevertheless remain, by force of which McCormick's patent fees were to be first paid, out of the proceeds of that particular part of the property assigned.

The partners agreed in the assignment, that, after paying McCormick the sum of \$14,610, and discharging the legal liabilities of the firm, the balance of the assets assigned, as fast as collected, should be paid one half to McCormick, one fourth to Gray, and the remaining fourth to certain assignees of Gray, but that each partner should have a lien on the share of the other, for any balance found due to him by the arbitrator; and that McCormick should have a lien on Gray's share, in the hands of the assignee, for a specific claim of \$2,500 together with any further amount which might prove to be due to him according to an account therein agreed to be rendered.

Upon the face of the award we are unable, by any fair intendment, to reconcile it with these stipulations. The radical error of the arbitrator seems to have been, that he disregarded these arrangements of the parties, by which they had finally bound so much of their assets as were in the hands of the assignee. It was his duty to assume that their contract, in respect to this part of the partnership property, was to be specifically executed, and then proceed to consider the equities of the parties in consequence of such an appropriation of those funds, as well as in consequence of the other facts. But each partner had a right to the specific performance of the trusts declared in the assignment, and the submission gave no power to the arbitrator to make an award inconsistent with their execution. But this award is so. In one aspect of this bill, it is a bill for the execution of those trusts, and no reason appears why they should not be executed, except the award. If the award is valid, the court below rightly decided that the bill must be dismissed, for it not only bars the general account of the partnership transactions, but destroys the particular trusts created by the assignment in favor of each partner, in respect to the proceeds of the *choses in action* assigned. Yet it was expressly agreed that the arbitrator should do nothing which could have that effect, and so far as the award is relied on as a defence to the bill against

Gray and Ogden, the trustee, to have these trusts per-
[* 39] formed, * it is in direct conflict with the express words of the submission.

It is suggested that the award may be held valid in part, and so far as it does pursue the submission. There are cases in which, after rejecting part of an award, the residue is sufficiently final, certain, and in conformity with the submission, to stand; but it is indispensable that the part thus allowed to stand should appear to be in no way affected by the departure from the submission. In the present case this does not appear. On the contrary, the basis of this whole award is erroneous, resting on the assumption that the disposal of the entire assets of the partnership was the subject of the award, and it is certain the arbitrator could properly have made no part of this award, as it stands, if he assumed that the trusts declared in the assignment were to be executed.

It is objected that the amount in controversy is not sufficient to justify an appeal to this court; but this is a suit for an account involving very large sums of money, the complainant claiming sums greatly exceeding two thousand dollars, by force of the assignment and otherwise, and the defendant Gray, insisting on the award, as a bar to the whole claim. It is no answer to say that, if this suit should be defeated, the complainant may have some other title, which will not be worth two thousand dollars less than the value of what he now claims. The question is, whether the matter in dispute in this suit is of the value of two thousand dollars. Besides, this matter is a claim for an account far exceeding that amount, and it does not appear that the defendant concedes to the complainant his whole claim, except some sum less than two thousand dollars. There remains, therefore, a dispute concerning this large claim, not narrowed by any concession of the defendant, so as to be reduced below the sum which is required by law for an appeal. It is urged, also, that the appeal is not well taken, because the complainant obtained leave to amend, after the decree dismissing the bill was entered. But it appears from the record that this decree to dismiss the bill was regularly stricken out before the leave to amend was granted, and afterwards, when the complainant elected not to amend, the bill was ordered to be dismissed by reason of the demurrer. From this last-mentioned decree the appeal was taken, and it was regularly and properly allowed.

The decree of the circuit court must be reversed, and the case remanded with directions to that court to overrule the demurrer, and order the defendants to answer the bill.

THE UNITED STATES, Appellants, v. FRANCIS P. FERREIRA, Administrator of FRANCIS PASS, deceased.

13 H. 40.

An act of congress having authorized the district judge of the United States for Florida, to adjudicate on claims for injuries suffered by inhabitants of Florida, by the operations of the American army in Florida, which claims were to be paid, if the secretary of the treasury should, on a report of the evidence, deem it equitable; *held*, not to be an authority to exercise any of the judicial power of the United States under the constitution; but that the judge acted as a commissioner, and no appeal lay to this court.

THE case is stated in the opinion of the court.

Crittenden, (attorney-general,) for the United States.

Johnson, Sherman, W. Cost Johnson, and Ewing, contra.

* TANEY, C. J., delivered the opinion of the court. [* 44]

This purports to be an appeal from the district court of the * United States for the northern district of Florida. [* 45]
The case brought before the court is this:—

The treaty of 1819,¹ by which Spain ceded Florida to the United States, contains the following stipulation in the 9th article.

“The United States shall cause satisfaction to be made for the injuries if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida.”

In 1823² congress passed an act to carry into execution this article of the treaty. The 1st section of this law authorizes the judges of the superior courts established at St. Augustine and Pensacola respectively, to receive and adjust all claims arising within their respective jurisdictions, agreeably to the provisions of the article of the treaty above mentioned; and the 2d section provides: “That in all cases where the judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be by the said judges reported to the secretary of the treasury, who, on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged.”

Under this law the secretary of the treasury held that it did not apply to injuries suffered in 1812 and 1813, from the causes mentioned in the treaty, but to those of a subsequent period. And in consequence of this decision, another law was passed in 1834,³ extending the provisions of the former act to injuries suffered in 1812 and 1813, but limiting the time for presenting the claims to one year

¹ 8 Stats. at Large, 252.

² 3 Ib. 768.

³ 6 Ib. 569.

from the passage of the act. This law embraced the claim of the present claimant.

He did not, however, present his claim within the time limited. And in 1849¹ a special law was passed authorizing the district judge of the United States for the northern district of Florida, to receive and adjudicate this claim and that of certain other persons mentioned in the law, under the act of 1834; the several claims to be settled by the treasury as in other cases under the said act. Florida had become a State of the Union in 1849, and therefore the district judge was substituted in the place of the territorial officer.

Ferreira presented his claim according to the district judge, who took the testimony offered to support it, and decided that the amount stated in the proceedings was due to him. The district attorney of the United States, prayed an appeal to this court, from this decision; and under that prayer the case has been docketed here as an appeal from the district court.

[* 46] *The only question now before us is whether we have any jurisdiction in the case. And in order to determine that question, we must examine the nature of the proceeding, before the district judge, and the character of the decision from which this appeal has been taken.

The treaty certainly created no tribunal by which these damages were to be adjusted, and gives no authority to any court of justice to inquire into or adjust the amount which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the treaty. It rested with congress to provide one, according to the treaty stipulation. But when that tribunal was appointed, it derived its whole authority from the law creating it, and not from the treaty; and congress had the right to regulate its proceedings and limit its power; and to subject its decisions to the control of an appellate tribunal, if it deemed it advisable to do so.

Undoubtedly congress was bound to provide such a tribunal as the treaty described. But if they failed to fulfil that promise, it is a question between the United States and Spain. The tribunal created to adjust the claims cannot change the mode of proceeding or the character in which the law authorizes it to act, under any opinion it may entertain, that a different mode of proceeding, or a tribunal of a different character, would better comport with the provisions of the treaty. If it acts at all, it acts under the authority of the law and must obey the law.

The territorial judges, therefore, in adjusting these claims, derived their authority altogether from the laws above mentioned; and their

¹ 9 Stats. at Large, 788.

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decisions can be entitled to no higher respect or authority than these laws gave them. They are referred, by the act of 1823, to the treaty, for the description of the injury which the law requires them to adjust; but not to enlarge the power which the law confers, nor to change the character in which the law authorizes them to act.

The law of 1823, therefore, and not the stipulations of the treaty, furnishes the rule for the proceeding of the territorial judges, and determines their character. And it is manifest that this power to decide upon the validity of these claims, is not conferred on them as a judicial function, to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term, are to be made, no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*, and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the [* 47] court in which he presides, nor recorded there; but he is required to transmit, both the decision and the evidence upon which he decided, to the secretary of the treasury; and the claim is to be paid, if the secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the secretary, but not upon that of the judge.

It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the act of congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner. The act of 1834 calls it an award. And an appeal to this court from such a decision, by such an authority from the judgment of a court of record, would be an anomaly in the history of jurisprudence. An appeal might as well have been taken from the awards of the board of commissioners, under the Mexican treaty, which were recently sitting in this city.

Nor can we see any ground for objection to the power of revision and control given to the secretary of the treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which

they will pay. And they had a right, therefore, to make the approval of the award by the secretary of the treasury, one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States until it is sanctioned by him; and his decision against the claimant for the whole or a part of the claim as allowed by the judge, is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an act of congress.

It is said, however, on the part of the claimant, that the treaty requires that the injured parties should have an opportunity of establishing their claims by a process of law; that process of law means a judicial proceeding in a court of justice; and that the right of supervision given to the secretary, over the decision of the district judge, is therefore a violation of the treaty.

The court think differently, and that the government of this country is not liable to the reproach of having broken its faith with Spain.

The tribunals established are substantially the same with [* 48] those usually created, where one nation agrees by * treaty to pay debts or damages which may be found to be due to the citizens of another country. This treaty meant nothing more than the tribunal and mode of proceeding ordinarily established on such occasions; and well known and well understood when treaty obligations of this description are undertaken. But if it were admitted to be otherwise, it is a question between Spain and that department of the government which is charged with our foreign relations; and with which the judicial branch has no concern. Certainly the tribunal which acts under the law of congress, and derives all its authority from it, cannot call in question the validity of its provisions, nor claim absolute and final power for its decisions, when the law by virtue of which the decisions are made, declares that they shall not be final, but subordinate to that of the secretary of the treasury, and subject to his reversal.

And if the judicial branch of the government had the right to look into the construction of the treaty in this respect, and was of opinion that it required a judicial proceeding; and that the power given to the secretary was void as in violation of the treaty, it would hardly strengthen the case of the claimant on this appeal. For the proceedings before the judge are as little judicial in their character as those before the secretary. And if his decisions are void on that account the decisions of the judge are open to the same objections; and neither the principal nor interest, nor any part of this claim could be paid at the treasury. For if the tribunal is unauthorized the awards are of no value.

The powers conferred by these acts of congress upon the judge as well as the secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a secretary as well as on a commissioner. But is not judicial in either case, in the sense in which judicial power is granted by the constitution to the courts of the United States. (W)

The proceeding we are now considering, did not take place before one of the territorial judges, but before a district judge of the United States. But that circumstance can make no difference. For the act of 1849, authorizes him to receive and adjudicate the claims of the persons mentioned in the law, under the act of 1834, and provides that these claims may be settled by the treasury, as other cases under the said act. It conferred on the district judge, therefore, the same power, and the same character, *and imposed on him [* 49] the same duty, that had been conferred and imposed on the territorial judges before Florida became a State.

It would seem, indeed, in this case, that the district judge acted under the erroneous opinion that he was exercising judicial power strictly speaking under the constitution, and has given to these proceedings as much of the form of proceedings in a court of justice as was practicable. A petition in form is filed by the claimant; and the judge states in his opinion that the district attorney appeared for the United States, and argued the case, and prayed an appeal. But the acts of congress require no petition. The claimant had nothing to do, but to present his claim to the judge with the vouchers and evidence to support it. The district attorney had no right to enter an appearance for the United States, so as to make them a party to the proceedings, and to authorize a judgment against them. It was no doubt his duty as a public officer, if he knew of any evidence against the claim, or of any objection to the evidence produced by the claimant, to bring it before the judge, in order that he might consider it, and report it to the secretary. But the acts of congress certainly do not authorize him to convert a proceeding before a commissioner into a judicial one, nor to bring an appeal from his award before this court.

The question as to the character in which a judge acts in a case of this description, is not a new one. It arose as long ago as 1792, in Hayburn's case, reported in 2 Dall. 409.

The act of 23d of March,¹ in that year, required the circuit courts of the United States to examine into the claims of the officers, and soldiers and seamen of the Revolution, to the pensions granted to invalids by that act, and to determine the amount of pay that would be equivalent to the disability incurred, and to certify their opinion to the secretary of war. And it authorized the secretary, when he had cause to suspect imposition or mistake, to withhold the pension allowed by the court, and to report the case to congress at its next session. The authority was given to the circuit courts; and a question arose whether the power conferred was a judicial one, which the circuit courts as such, could constitutionally exercise.

The question was not decided in the supreme court in the case above mentioned. But the opinions of the judges of the circuit courts for the districts of New York, Pennsylvania, and North Carolina, are all given in a note to the case by the reporter.

The judges in the New York circuit, composed of Chief Justice Jay, Justice Cushing, and Duane, district judge, held that the power could not be exercised by them as a court. But in [* 50] * consideration of the meritorious and benevolent object of the law, they agreed to construe the power as conferred on them individually as commissioners, and to adjourn the court over from time to time, so as to enable them to perform the duty in the character of commissioners, and out of court.

The judges of the Pennsylvania circuit, consisting of Wilson and Blair, justices of the supreme court, and Peters, district judge, refused to execute it altogether, upon the ground that it was conferred on them as a court, and was not a judicial power when subject to the revision of the secretary of war and congress.

The judges of the circuit court of North Carolina, composed of Iredell, justice of the supreme court, and Sitgreaves, district judge, were of opinion that the court could not execute it as a judicial power; and held it under advisement whether they might not construe the act as an appointment of the judges personally as commissioners, and perform the duty in the character of commissioners out of court, as had been agreed on by the judges of the New York circuit.

These opinions, it appears by the report in 2 Dall., were all communicated to the President, and the motion for a *mandamus* in Hayburn's case, at the next term of the supreme court, would seem to have been made merely for the purpose of having it judicially determined in this court, whether the judges, under that law, were authorized to act in the character of commissioners. For every judge of the court, except Thomas Johnson, whose opinion is not given, had

¹ 1 Stat. at Large, 243.

formally expressed his opinion in writing, that the duty imposed, when the decision was subject to the revision of a secretary and of congress, could not be executed by the court as a judicial power; and the only question upon which there appears to have been any difference of opinion, was whether it might not be construed as conferring the power on the judges personally as commissioners. And if it would bear that construction, there seems to have been no doubt, at that time, but that they might constitutionally exercise it, and the secretary constitutionally revise their decisions. The law, however, was repealed at the next session of the legislature, and a different way provided for the relief of the pensioners; and the question as to the construction of the law was not decided in the supreme court. But the repeal of the act clearly shows that the President and congress acquiesced in the correctness of the decision, that it was not a judicial power.

This law is the same in principle with the one we are now considering, with this difference only, that the act of 1792 imposed the duty on the court *eo nomine*, and not personally on the judges. In the case before us it is imposed upon the judge, and *it [* 51] appears from the note to the case of Hayburn, that a majority of the judges of the supreme court were of opinion that if the law of 1792 had conferred the power on the judges, they would have held that it was given to them personally by that description; and would have performed the duty as commissioners, subject to the revision and control of the secretary and congress, as provided in the law. Nor have Justices Wilson, Blair, and Peters, district judges, dissented from this opinion. Their communication to the President is silent upon this point. But the opinions of all the judges embrace distinctly and positively the provisions of the law now before us, and declare that, under such a law, the power was not judicial within the grant of the constitution, and could not be exercised as such.

Independently of these objections, we are at some loss to understand how this case could legally be transmitted to this court, and certified as the transcript of a record in the district court. According to the directions of the act of congress, the decision of the judge, and the evidence on which it is founded, ought to have been transmitted to the secretary of the treasury. They are not to remain in the district court, nor to be recorded there. They legally belong to the office of the secretary of the treasury, and not to the court; and a copy from the clerk of the latter would not be evidence in any court of justice. There is no record of the proceedings in the district court of which a transcript can legally be made and certified; and consequently there is no transcript now before us that we can recognize as evidence of any proceeding or judgment in that court.

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A question might arise whether commissioners appointed to adjust these claims, are not officers of the United States within the meaning of the constitution. The duties to be performed are entirely alien to the legitimate functions of a judge or court of justice, and have no analogy to the general or special powers ordinarily and legally conferred on judges or courts to secure the due administration of the laws. And, if they are to be regarded as officers, holding offices under the government, the power of appointment is in the President, by and with the advice and consent of the senate; and congress could not by law, designate the persons to fill these offices. And if this be the construction of the constitution, then as the judge designated could not act in a judicial character as a court, nor as a commissioner, because he was not appointed by the President, every thing that has been done under the acts of 1823, and 1834, and 1849, would be void, and the payments heretofore made, might be recovered back by the United States. But this question has not been made; nor does it arise in the case. It could arise only in a suit by the United [* 52] States to recover back the money. And *as the case does not present it, and the parties interested are not before the court, and these laws have for so many years been acted on as valid and constitutional, we do not think it proper to express an opinion upon it. In the case at bar, the power of the judge to decide in the first instance, is assumed on both sides, and the controversy has turned upon the power of the secretary to revise it; and it is in this aspect of the case, that it has been considered by the court, in the foregoing opinion.

The appeal must be dismissed for want of jurisdiction.

14 H. 103; 17 H. 478, 525; 18 H. 272; 1 Wal. 248; 7 Wal. 188.

NOTE BY THE CHIEF JUSTICE, INSERTED BY ORDER OF THE COURT.

Since the foregoing opinion was delivered, the attention of the court has been drawn to the case of *The United States v. Yale Todd*, which arose under the act of 1792, and was decided in the supreme court, February 17, 1794. There was no official reporter at that time, and this case has not been printed. It shows the opinion of the court upon a question which was left in doubt by the opinions of the different judges, stated in the note to *Hayburn's case*. And as the subject is one of much interest, and concerns the nature and extent of judicial power, the substance of the decision in *Yale Todd's case* is inserted here, in order that it may not be overlooked, if similar questions should hereafter arise.

The 2d, 3d, and 4th sections of the act of 1792, were repealed at the next session of congress by the act of February 28, 1793.¹ It was these three sections that gave rise to the questions stated in the note to *Hayburn's case*. The repealing act pro-

¹ 1 Stats. at Large, 324.

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vided another mode for taking testimony, and deciding upon the validity of claims to the pensions granted by the former law; and by the 3d section it saved all rights to pensions which might be founded "upon any legal adjudication," under the act of 1792, and made it the duty of the secretary of war, in conjunction with the attorney-general, to take such measures as might be necessary to obtain an adjudication of the supreme court, "on the validity of such rights, claimed under the act aforesaid, by the determination of certain persons styling themselves commissioners."

It appears from this case, that Chief Justice Jay and Justice Cushing acted upon their construction of the act of 1792, immediately after its passage, and before it was repealed. And the saving and proviso, in the act of 1793, was manifestly occasioned by the difference of opinion upon that question which existed among the justices, and was introduced for the purpose of having it determined, whether under the act conferring the power upon the circuit courts, the judges of those courts, when refusing for the reasons assigned by them to act as courts, could legally act as commissioners out of court. If the decision of the judges, as commissioners, was a legal adjudication, then the party's right to the pension allowed him was saved; otherwise not.

In pursuance of this act of congress, the case of Yale Todd was brought before the supreme court, in an amicable action, and upon a case stated at February term, 1794.

The case was docketed by consent, the United States being plaintiff, and Todd the defendant. The declaration was for \$172.91, for so much money had and received by the defendant to the use of the United States; to which the defendant pleaded *non assumpsit*.

* The case as stated, admitted that on the 3d of May, 1792, the defendant [* 53] appeared before the Hon. John Jay, William Cushing, and Richard Law, then being judges of the circuit court held at New Haven, for the district of Connecticut, then and there sitting, and claiming to be commissioners under the act of 1792, and exhibited the vouchers and testimony to show his right under that law to be placed on the pension list; and that the judges above named, being judges of the circuit court, and then and there sitting at New Haven, in and for the Connecticut district, proceeded, as commissioners designated in the said act of congress, to take the testimony offered by Todd, which is set out at large in the statement, together with their opinion that Todd ought to be placed on the pension list, and paid at the rate of two thirds of his former monthly wages, which they understood to have been eight dollars and one third per month, and the sum of \$150 for arrears.

The case further admits, that the certificate of their proceedings and opinions, and the testimony they had taken, were afterwards, on the 5th of May, 1792, transmitted to the secretary of war, and that by means thereof Todd was placed on the pension list, and had received from the United States \$150 for arrears, and \$22.91 claimed for his pension aforesaid, said to be due on the 2d of September, 1792.

And the parties agreed that if upon this statement the said judges of the circuit court sitting as commissioners, and not as a circuit court, had power and authority by virtue of said act so to order and adjudge of and concerning the premises, that then judgment should be given for the defendant, otherwise for the United States for \$172.91, and six cents cost.

The case was argued by Bradford, attorney-general for the United States, and Hill-house for the defendant; and the judgment of the court was rendered in favor of the United States for the sum above mentioned.

Chief Justice Jay and Justice Cushing, Wilson, Blair, and Paterson, were present at the decision. No opinion was filed stating the grounds of the decision. Nor is any dissent from the judgment entered on the record. It would seem, therefore, to have been unanimous, and that Chief Justice Jay and Justice Cushing became satisfied, on further reflection, that the power given in the act of 1792 to the circuit court, as a

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court, could not be construed to give it to the judges out of court as commissioners. It must be admitted that the justice of the claims and the meritorious character of the claimants would appear to have exercised some influence on their judgments in the first instance, and to have led them to give a construction to the law which its language would hardly justify upon the most liberal rules of interpretation.

The result of the opinions expressed by the judges of the supreme court of that day in the note to *Hayburn's case*, and in the case of *The United States v. Todd*, is this:—

1. That the power proposed to be conferred on the circuit courts of the United States by the act of 1792 was not judicial power within the meaning of the constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts.

2. That as the act of congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court in the character of commissioners.

3. That money paid under a certificate from persons not authorized by law to give it, might be recovered back by the United States.

The case of *Todd* was docketed by consent in the supreme court; and the court appears to have been of opinion that the act of congress of 1793, directing the secretary of war and attorney-general to take their opinion upon the question, gave them original jurisdiction. In the early days of the government, the right of congress to give original jurisdiction to the supreme court, in cases not enumerated in the constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided *Todd's case*. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the constitution, and that congress cannot enlarge it. In all other cases its power must be appellate.

ROBERT R. BARROW, Plaintiff in Error, *v.* NATHANIEL B. HILL.

13 H. 54.

An exception having been taken to the refusal of the court below to continue the case, the judgment was affirmed with ten per cent. damages, on the ground that the writ of error was sued out merely for delay.

THE case is stated in the opinion of the court.

Venable, for the defendant.

No counsel *contra*.

[*55] *TANEY, C. J., delivered the opinion of the court.

This case is brought up by a writ of error, directed to the circuit court of the United States for the eastern district of Louisiana.

[*56] *No counsel has appeared in this court for the plaintiff in error. The case has been called in its regular order for

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argument, and thereupon the counsel for the defendant has, under the 19th rule of the court, opened the record and argued the case, and prays an affirmance of the judgment, with ten per cent. damages, on the ground that the writ of error was issued merely for delay.

Upon looking into the record, it appears that two exceptions were taken in the court below by the plaintiff in error; and both of them were taken to the refusal of the court to continue the case to the next term.

It has been repeatedly decided in this court, that a motion for the continuance of the cause addresses itself to the sound judicial discretion of the court, and its decision, for or against the motion, cannot be assigned as error in this court. The rule is so familiar in practice, that it is unnecessary to refer to cases to prove it. The decision of the circuit court, therefore, upon the motions above mentioned, is no ground for reversing the judgment, and does not afford any reasonable foundation for suing out this writ of error.

And, upon examining the statement in the exceptions, and the reasons assigned by the court for its refusal, the inference would seem to be irresistible, that the continuance was not asked for by the plaintiff in error, under the expectation that it would enable him to obtain testimony material to his defence, but to delay the payment of a just debt, and that the writ of error was sued out for the same purpose. The case, therefore, falls within the 17th rule of the court, and the judgment is accordingly affirmed, with ten per cent. interest on the amount, from the rendition of the judgment in the circuit court until paid.

JOHN D. BRADFORD and BENJAMIN M. BRADFORD, Appellants, v. THE PRESIDENT, DIRECTORS, AND COMPANY OF THE UNION BANK OF TENNESSEE.

13 H. 57.

A having purchased land from B, suffered it to be sold for taxes; afterwards C, who was A's surety for the price, obtained from B a new bond to convey, the first being surrendered; B was ignorant of the tax sale, received no new consideration, and intended merely to substitute C for A. On a bill by C to have the contract rescinded, and the judgment against him for the purchase-money enjoined; *Held*, 1. That the loss of the title was C's loss. 2. That the bond to C should be reformed, so as to accord with the real agreement. 3. That this might be done under the answer without a cross-bill; and a decree was made accordingly.

THE case is stated in the opinion of the court.

Volney E. Howard, for the appellants.

Coze and Carlisle, contra.

[* 61] * NELSON, J., delivered the opinion of the court.

This is an appeal from the district court of the United States for the northern district of Mississippi.

[* 62] * The complainants in the court below, the appellants here, filed their bill for the specific performance of an agreement with the defendants for the conveyance of two sections of land in the Chickasaw cession.

The land was to be conveyed for the consideration of the sum of \$3,741, payable in instalments, the last payment to be made on the 12th of October, 1847, at which time the deed was to be delivered.

The bill states that, at the time of the purchase, the defendants had no title to the land, as both sections, with the exception of the quarter of one of them, had been previously sold for taxes, and the time for redemption expired. That since then the defendants have redeemed one of the sections; but it is alleged that the purchase of the two sections was one entire contract, and that the main inducement was to obtain a title to the whole tract, and that the purchase would not have been made of either section separately on account of the situation and state of the improvements. That it was the duty of the defendants to have paid the taxes, and to have prevented the sale therefor.

The bill further states, that a judgment had been recorded against the complainants for the amount of the purchase-money; and that the defendants were endeavoring to enforce the collection on execution. That they have tendered the amount of the judgment and interest, and have demanded a deed conveying a good and sufficient title to the land, which demand has been refused. That they are still willing to pay the judgment with interest and costs, and tendered the same in court, and to accept a complete title from the defendants if they can make one.

The bill prays for an injunction enjoining the defendants from collecting the judgment, that they be compelled to exhibit their title, and to execute the contract specifically, and to account for the rents and profits. And that, if the defendants are unable to execute the contract specifically and entire, it may be delivered up and cancelled, and the injunction made perpetual.

The defendants, in their answer, admit the execution of the contract for the conveyance of the two sections as stated in the bill; but deny that the transaction was intended as a purchase of the land; on the contrary, they insist it was intended as a substitution of John D. Bradford, one of the complainants, to the rights of one John L. Brown, who had previously purchased the same, and to whom the defendants had agreed to convey the title.

The defendants allege that they entered into a contract with Brown for the sale of the land on the 20th of October, 1841; that he executed to them his four several notes for the purchase-money, payable in one, two, three, and four years, which notes were indorsed *by John D. Bradford, one of the complainants, as [*63] surety, and that the contract was conditioned to make to Brown a good and valid title on the payment of the purchase-money.

That default was made in the payment, and a judgment recovered against Bradford as indorser, an execution issued, and about to be levied upon his property. And that thereupon an application was made to them on behalf of Bradford, for an arrangement by which he might have the benefit of the purchase of Brown, as he was insolvent, and there were old judgments standing against him, which would bind the land if the title was made to him. That in consequence of these representations they assented to the arrangement, simply on the ground of favor and indulgence to Bradford, not being disposed to coerce the payment of the money from a surety, and at the same time withhold from him the means of indemnifying himself.

And that, at the suggestion on behalf of Bradford, and as the simplest mode of effecting the object of the arrangement, they took up the title bond previously given to Brown, and gave a new one to him; agreeing, at the same time, to a request for further indulgence in the payment of the purchase-money by extending it for the period of one, two, and three years. That it was under these circumstances, the contract in question was entered into by the defendants, on the 9th of January, 1845, to convey the title to the two sections to Bradford instead of to Brown, the original purchaser.

The defendants admit they have been informed, and believe that both sections, with the exception stated, have been sold for taxes, prior to the date of this last arrangement; but aver that they had no knowledge of the fact at the time. They admit that they had not paid any taxes accruing after the purchase by Brown, 12th October, 1841, nor had they paid any attention to the same, as they considered it the duty of Brown.

They admit that they have redeemed one of the sections, and would have redeemed the greater part of the other, had it not been for the interference of the complainants to prevent the purchaser from assenting to it.

They also admit that they cannot make an unincumbered title to the east half and southwest quarter of section No. 12, if the tax-sale is a valid one; but if the same is not, they can make a good valid title to the whole of both sections.

These are the material allegations as set forth in the pleadings. The proofs in the record sustain substantially the view of the case as stated in the answer.

The original purchase of the two sections by Brown from the defendants, of the 12th of October, 1841, extended the payment [* 64] of the purchase-money, running through a period of four years; and although it contains no provision for possession in the mean time, it is conceded that the vendee was entitled to it, and that actual possession was taken accordingly.

Indeed, the courts of Mississippi regard the vendor in contracts of this description as standing, in most respects, upon the footing of one who has already conveyed the title, and taken back a mortgage as security for the purchase-money; and the vendee as mortgagor in possession. 4 Sm. & Marsh. 300; 6 *ibid.* 149; 10 *ibid.* 184.

Brown, therefore, during the running of the contract, was at least the owner of the equitable title, accompanied with the possession; and as such was under obligation to take care of and pay the taxes assessed, accruing after his purchase. And the loss of the title to the whole or any portion of the tract in consequence of neglect, in this respect, is attributable to his own fault, for which the defendants are not responsible. No doubt, with a view to the better security of the purchase-money, they might have paid the taxes in case of the neglect of the vendee, and charged the amount to him. But this was a question they had a right to determine for themselves, and with which Brown had no concern.

It is quite clear, therefore, if the case stood on the original contract of purchase, the defendants, on the tender of the purchase-money, would have been bound only to convey to the vendee a good and valid title to the land at the time, subject to any outstanding title or titles that existed under tax-sales, where the payment of the taxes had accrued subsequent to the purchase. For these titles they would not have been responsible, as they arose from the neglect of Brown.

The question in the case is, whether or not the complainants stand in any different or better situation.

John D. Bradford, one of them, was surety for Brown for the purchase money, and against whom a judgment had been recovered for the amount, execution issued, and about to be enforced, and, for aught that appears in the record, he was abundantly able to meet the demand. If payment had been enforced, he would have been left to look to Brown, the principal, for indemnity, who, it is admitted, was insolvent. In this state of the proceedings, he applied to the defendants through his brother, the other complainant, for relief; first, to obtain from them the interest in the land which Brown was enti-

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tled to, he consenting that it might be thus transferred; and second, for further indulgence in the time of payment of the money, the brother offering to join in the security. To induce the defendants to make this change, it was urged that, if the deed was made to *Brown, judgments against him would bind the land, [*65] and Bradford be deprived of the means of security for his advance; and that he was sure, from his knowledge of the defendants, it was not their intention to distress him for an act of friendship to Brown, although he had made himself liable for the debt; that for this purpose he wished, with the concurrence of Brown, the title bond to be changed by the defendants from Brown to him; that this could work no detriment to them, and would afford him security for his liability; and also that the payment might be extended to one, two, and three years.

The defendants consented, and the arrangement was made accordingly, the new bond for the title corresponding with the old one, except in the change of the name of Bradford for Brown, and the times of payment. The new bond thus given, 9th of January, 1845, on its face, bound them to make a valid title to the two sections on the 9th of January, 1848, when the last payment became due.

Under these circumstances, it is contended that the defendants are under obligation to make a deed to Bradford, conveying a complete title to the two sections, on his tender of the purchase-money, or, in default thereof, that the agreement between them should be cancelled, on the ground: 1. That it is not competent for the court, upon settled principles of law, to admit parol evidence to alter or vary the terms or legal effect of the written agreement; and, 2. Even if it is, that the new bond for the title is distinct from, and independent of, the one given to Brown, and hence the conveyance to Bradford is not subject to the qualifications as to the title to which the conveyance to Brown might have been on account of the outstanding tax titles from his own neglect.

It is by no means clear that Bradford is not chargeable with notice of the condition of the title, at the time he made application to the defendants to have the bond changed from Brown to himself. These two sections seem to have been his only means of indemnity as surety, which circumstance would naturally have led him to have made an examination into it; and, especially, as his liability had passed into a judgment, and which was about to be enforced against him. It is fair, also, to presume that he would make the inquiry, with a view to the condition and value of the property in connection with his application to obtain the change of the bond, and get the title to himself. Besides, it is inferable from the evidence in the

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record, that he resided at the time in the same county in which the lands lie, and was in a situation to obtain readily the necessary information. And, assuming this conclusion to be well founded, the concealment of the facts from the defendants at the time, [* 66] * would be a fraud upon them, which at once removes all difficulty in respect to the admissibility of the evidence as to the true character of the transaction.

But we do not propose to put the case upon this ground ; as we are satisfied independently of this view, the evidence is admissible and proper to show the understanding and real intent of the parties, although different from that which the written contract imports on its face.

“ One of the most common classes of cases,” says Judge Story, in his Commentaries on Equity Jurisprudence, “ in which relief is sought in equity on account of a mistake of facts, is that of written agreements, either executory or executed. Sometimes by mistake the written agreement contains less than the parties intended ; sometimes it contains more ; and sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent. In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intent of the parties.” 1 Story’s Eq. Jurisprudence, § 152. And Lord Hardwicke remarked, in *Henkle v. Royal Exchange Assur. Co.* 1 Ves. Sen. 317 : “ No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts so that if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified.”

And this ground, it is agreed, is available to a defendant by way of defence in the answer to a bill for a specific performance ; as he may thus insist upon any matter which shows it to be inequitable to grant the relief prayed for. The court will not interpose to compel a specific execution, when it would be against conscience and justice to do so. 1 Story’s Eq. Juris. 174 ; 2 *ibid.* 80.

These principles have become elementary, and it is needless to refer to further authorities to sustain them.

Now, we are perfectly satisfied, upon the proofs before us, that it was the agreement and understanding of both parties in this case, that Bradford should be substituted in the place of Brown in the title bond, and should take such interest as he had in the two sections in question under it, and nothing more ; and this, that he might become entitled to the deed, when the purchase-money was paid, which otherwise must have been made to Brown ; in other words, an

agreement to put the surety in the place of the principal for the sake of indemnity, as it was seen that he would be obliged to advance the money. For this purpose, the defendants were appealed to on the ground that there were judgments against Brown which would bind the land * if the deed was made to him, and it [* 67] was suggested that the simplest way to effect the object would be to take up the old, and give a new title bond to Bradford. The suggestion was readily acquiesced in by the defendants, as a mode of making the change that would enable him to obtain the benefit of the security desired, Brown first consenting to it. But the suggestion was acquiesced in, and the new bond given for the title, in ignorance of the fact that portions of the land had been previously sold for taxes through the neglect of Brown, and the titles outstanding. This fact, as is apparent, affected most materially the character of the transaction, as the mode in making the substitution has had the effect of imposing upon the defendants responsibilities they were not under to Brown; namely, to make good the title to the two sections, notwithstanding it had been lost by his neglect.

Now this they were not asked by Bradford to do, nor was such the agreement or understanding of either of the parties; but directly the contrary. The agreement was for a substitution of Bradford in the place of Brown, in the previous sale.

The form of the bond for the title, therefore, given to Bradford, and thus inadvertently adopted, and which imposes upon the defendants this new obligation, grew out of a mistake, and misapprehension of the facts as to the condition of the title at the time. Had the condition of the title been known, it is obvious the new bond would not have been given, or, if given, its terms would have been qualified according to the true meaning of the parties.

In its present form it does not at all carry out their understanding and agreement in making the arrangement desired, but defeats them; for in consequence of this misapprehension as to the state of the title, it is not a substitution of interest of Brown, but in effect a resale to Bradford, by which he is entitled, not to such a deed as the defendants were under obligation to make to Brown, but to one investing him with a complete title to the land.

And as they are disabled from making this title by reason of the tax sales, if it is not competent for the court to correct the mistake and reform the contract, according to the real understanding of the parties, the result is, they have lost their land, and Bradford, the surety for the purchase-money, is discharged from his liability—a result any thing but within the contemplation of the parties at the time of the arrangement.

We admit, if the defendants had agreed to resell this land to Bradford, and to give him a title, the fact that they were ignorant of the tax sales would have afforded no ground of defence to a [* 68] specific execution. The title bond in that case would *have stood on the footing both parties intended, namely, that a good title should be given when the purchase-money was paid.

But here there was no agreement to sell on the one side or to buy on the other. The agreement was to give Bradford the benefit of the sale already made, and to make him such a title as the defendants were under obligation to make to Brown. It was in truth but an assent on their part to an agreement on the part of Bradford with Brown that he should be substituted in his place in that sale—a sort of subrogation of the surety to the rights of the principal. The mode adopted to carry out the arrangement would have conformed to the intention of the parties had the facts been as the defendants had every reason to believe, namely, that no change had taken place in the condition of the title. The mistake as to this fact has given an effect to the instrument far beyond the agreement and real understanding of the parties, and which will operate most unjustly and inequitably, if permitted to stand.

The hardship of the case, as well as the unconscientious advantage sought to be obtained, will be more apparent, when we recur to the fact, that the defendants had no interest whatever in consenting to the change of the contract in favor of Bradford. Their debt was secure and in a situation to be immediately realized, as it was in judgment and execution, and it is admitted he was able to meet it. They were actuated altogether from a disposition to assist him in obtaining some indemnity as surety for this debt, which it belonged to Brown to pay. And as it was a matter of indifference to them whether they made the deed to Brown or to him, they readily assented to the proposed arrangement. Indeed, it would have been hardly creditable, under the circumstances in which the application was made, to have refused it.

We are satisfied, therefore, that the case falls within the established principles of equity, in granting relief against contracts entered into upon a mistake, and misapprehension of the facts, and where the enforcement of which would enable one of the parties to obtain a most unconscientious advantage over the other.

The next question is as to the disposition to be made of the case.

The former course of proceeding in chancery, which was most usually adopted, would be to dismiss the bill without prejudice, and which in this case would lead us to affirm the decree of the court below. The effect of this would probably be to open up a new

scene of litigation between the parties ; as the complainant, John D Bradford, could resort to his remedy at law upon the title bond ; and the defendants would be obliged to file a cross-bill for the purpose of staying his proceedings, and reforming *the [* 69] contract so as to make it conform to the real understanding of the parties.

The more modern course of proceeding is to dispense with the cross-bill, and make the same decree upon the answer to the original bill that would be made if a cross-bill had been filed, if the defendant submits in his answer to a performance of the real agreement between the parties. The answer is viewed in the light of a cross-bill, and becomes the foundation for a proper decree by the court. This practice has been adopted as most convenient and expeditious in settling definitively the rights of the parties, and for the sake of saving further litigation and expense.

In the case of *Staplyton v. Scott*, 13 Ves. 425, the master of the rolls dismissed the cross-bill with costs, considering it unnecessary, as the court would upon the answer decree a specific execution of what was the real agreement.

This practice was followed by Lord Eldon in *Fife v. Clayton*, 13 ibid. 546, on the ground that it was right in principle, and would save expense. A specific performance was also decreed upon the answer in *Gwyn v. Lethbridge*, 14 Ves. 585, and it appears now to be a very common practice in chancery proceedings. 1 Daniell, Pr. 436 and note ; 2 ibid. 101, 102 and note ; Story's Eq. Pl. § 394.

These cases refer more particularly to the right of the defendant to have a decree for a specific execution of the agreement according to the answer, so that he may be saved the expense of a cross-bill, even against the claim of the complainant to have his bill dismissed.

The same principle, however, seems to be equally applicable to the complainant where he insists upon the decree for specific performance of the contract as established by the proofs, although different from that set up in the bill. Indeed, we perceive no solid distinction between the two cases. In both, the contract, of course, when ascertained and conformed to the real understanding of the parties, must be such a one as the court deems fit and proper to be enforced. 2 Daniell, Pr. 1001, 1002 ; *London and Birmingham Railway Co. v. Winter, Craig & Phil.* 62.

We shall adopt this practice in the disposition of this case, as it will save all further litigation and expense, and settle the rights of the parties, as, in our judgment, the principles of equity and justice demand.

The bill was dismissed by the court below without prejudice, leav-

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ing the complainants at liberty to resort to any other remedy in the case which they might deem expedient.

We shall, therefore, reverse the decree, and remit the pro-
[* 70] ceedings * to the court below, with directions that the defendants execute a deed of the two sections of land in question to John D. Bradford, with covenant of warranty, subject, however, to any outstanding title or titles accruing from tax sales since the sale, and title bond to John L. Brown, 12th October, 1841, and deposit the same with the clerk of the court to be delivered to the said Bradford on his surrendering and cancelling the title bond made to him on the 9th January, 1845, and paying the judgment the defendants have against the complainants for the purchase-money, with interest; also that the injunction be dissolved, and the defendants be at liberty to enforce the execution of the judgment; that no costs shall be allowed to the appellant in this court, and that costs shall be decreed to the defendants in the court below.

Daniel, J., and Grier, J., dissented.



THE RICHMOND, FREDERICKSBURG, AND POTOMAC RAILROAD COMPANY,
Plaintiffs in Error, v. THE LOUISA RAILROAD COMPANY.

13 H. 71.

Under a stipulation in the charter of a railroad corporation, that the State would not, within thirty years, allow any other railroad to be constructed, within certain limits, the probable effect of which would be to diminish the number of a certain description of passengers on the railroad then chartered. *Held*, 1. That this stipulation was to be construed strictly, as against the corporation. 2. That it was not violated merely by chartering another railroad, which might be used, exclusively, to transport merchandise.

THE case is stated in the opinion of the court.

Robinson and Badger, for the plaintiffs.

Lyons and Johnson, contra.

[* 78] * GRIER, J., delivered the opinion of the court.

This case comes before us on a writ of error to the court of appeals of Virginia.

The appellants filed their bill in the superior court of chancery for the Richmond circuit, setting forth that, on the 25th of February, 1834, the general assembly of Virginia passed an act entitled: "An act to incorporate the stockholders of the Richmond, Fredericksburg, and Potomac Railroad Company." That in order to induce persons to embark their capital in a work of great public utility, the legisla-

ture pledged itself to the said company, that, in the event of the completion of said road from the city of Richmond to the town of Fredericksburg, within a certain time limited by said act, the general assembly would not, for the period of thirty years from the completion of said railroad, allow any other railroad to be constructed between those places, or any portion of that distance, the probable effect of which would be to diminish the number of passengers travelling between the one city and the other upon the railroad authorized by said act, or to compel the said company, in order to retain such passengers, to reduce the passage-money; that the stock was afterwards subscribed, the charter issued, and the road constructed, within the time limited by the act; that on the 18th of February, 1836, an act was passed incorporating "The Louisa Railroad Company, for the purpose of constructing a railroad from some point on the line of the Richmond, Fredericksburg, and Potomac Railroad, in the neighborhood of Taylorsville, passing by or near Louisa court house, to a point in the county of Orange, near the eastern base of the southwest mountains, with leave to extend it to the Blue Ridge, or across the same to Harrisonburg; that on the 28th of December, 1838, this railroad was opened from Louisa court house to the junction with complainants' road. The bill then gives a history of the several contracts made between the two companies for the transportation of the freight and passengers of the Louisa railroad from the junction to Richmond, and of the frequent and protracted disputes and difficulties which arose between the two corporations on the subject of the compensation to be paid to the complainants for such services, the particulars of which it is unnecessary to mention; the result being, that the respondents insisting that the demands made by complainants for this service were exorbitant and oppressive, finally petitioned the legislature for leave to extend their road from the junction to the city of Richmond. That complainants resisted, and protested against the passage * of [* 79] such an act, as an infringement of the rights guaranteed to them by their act of incorporation. Nevertheless, the legislature, on the 23d of March, 1848, passed an act authorizing the respondents to extend their road from the junction to the dock, in the city of Richmond, unless the complainants would comply with certain terms which were deemed reasonable; and these terms being refused by complainants, the respondents commenced the construction of their road to Richmond, and to extend it across the road of complainants at the junction.

The bill insists that the grant of the act of the 27th of March, 1848, to the Louisa Railroad Company, is inconsistent with the previous

grant to complainants, and impairs the obligation of the contract made with them; that the lands condemned for their franchise cannot be taken from the complainants for the use of the respondents, and that they have, therefore, no right to build their road across the road of complainants. It prays, therefore, that the respondents may be enjoined: 1. From entering upon any lands which have been condemned for the use of complainants' road, for the purpose of constructing a railroad across it. 2. That the respondents may be enjoined from all further proceedings towards the construction of a railroad between the junction and the city of Richmond; and, 3. That they may be enjoined from "transporting on the railroad so proposed, persons, property, or the mail, and especially from transporting passengers travelling between the city of Richmond and the city of Washington."

The respondents, in their answer, deny "that the act of assembly which authorizes them to construct their road from its terminus at the city of Richmond, in any manner violates the bill of rights, or constitution of Virginia, or the constitution of the United States, or any right guaranteed to the complainants by their act of incorporation. They deny, also, that it is their purpose to invade or violate any right or privileges of the complainants by the manner in which they shall use their road if they are permitted to construct it."

The state court decided: 1. That the privilege or monopoly guaranteed to the complainants by the 38th section of their act of incorporation, was that of transporting passengers between Richmond and Washington; but that the legislature, by that enactment, did not part with the power to authorize the construction of railroads between Richmond and Fredericksburg for other purposes; that they had, therefore, the right to authorize the extension of respondents' road to the dock in the city of Richmond, and consequently the court refused to enjoin the respondents from constructing their road.

2. That a grant of a franchise to one company to make a [* 80] railroad or canal, is not *infringed by authorizing another railroad or canal to be laid across it, on paying such damages as may accrue to the first, in consequence thereof. The injunction for this purpose was therefore refused.

3. "That if the Louisa company shall hereafter use their road by transporting passengers in violation of the rights guaranteed to complainants, by the 38th section of their charter, the remedy at law seems to be plain, easy, and adequate; if, however, it should, from any cause, prove to be inadequate, it may be proper to interpose by injunction, and that will depend on the facts which may then be made to appear."

The decree having dismissed the complainants' bill, was "a final decree or judgment;" and that decree having been affirmed by the court of appeals by their refusal to entertain an appeal; and, moreover, the record showing that "there was drawn in question the validity of a statute and authority exercised under the State of Virginia," "on the ground of their being repugnant" to that clause of "the constitution of the United States" which forbids a State to pass "any law impairing the obligation of contracts;" and "the decision of the court being in favor of their validity," there can be no doubt of the jurisdiction of this court to review the decision of the state court.

For this purpose, it will be necessary to set forth, at length, the 38th section of the act of incorporation of the company complainant, which contains the pledge or contract which their bill claims to have been impaired or infringed by the act of 1848, authorizing the respondents to continue their road from the junction to the dock in Richmond. It is as follows:—

"And whereas the railroad authorized by this act will form a part of the main northern and southern route between the city of Richmond and the city of Washington, and the privilege of transporting passengers on the same, and receiving the passage-money, will, it is believed, be a strong inducement for individuals to subscribe for stock in the company, and the general assembly considers it just and reasonable that those who embark in the enterprise should not be hereafter deprived of that which forms a chief inducement to the undertaking.

"38. Be it therefore enacted and declared, and the general assembly pledges itself to the said company, that, in the event of the completion of the said railroad from the city of Richmond to the town of Fredericksburg, within the time limited by this act, the general assembly will not, for the period of thirty years from the completion of the said railroad, allow any other railroad to be constructed between the city of Richmond and the city of Washington, or for any portion of the said distance, the probable effect of which would be to diminish the number * of passengers travelling between [*81] the one city and the other, upon the railroad authorized by this act, or to compel the company, in order to retain such passengers, to reduce the passage money: Provided, however, that nothing herein contained shall be so construed as to prevent the legislature, at any time hereafter, from authorizing the construction of a railroad between the city of Richmond and the towns of Tappahannock or Urbana, or to any intermediate points between the said city of Richmond and the said towns: And provided, also, that nothing

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herein contained shall be construed to prevent the general assembly from chartering any other company or companies to construct a railroad from Fredericksburg to the city of Washington.”

Two objections were made by counsel to the validity of this act, on which we do not think it necessary to express an opinion. They are: 1. That one legislature cannot restrain, control, or bargain away the power of future legislatures, to authorize public improvements for the benefit of the people. 2. That the grant made by this section is void for uncertainty, being both unintelligible and impracticable, furnishing no standard by which any tribunal can determine when the grant is violated and when not, according to its terms.

For the purposes of the present decision, we shall assume that the legislature of Virginia had full power to make this contract, and that the State is bound by it; and, moreover, that the franchise granted is sufficiently defined and practicable for the court to determine its extent and limitations.

It is a settled rule of construction adopted by this court, “that public grants are to be construed strictly.”

This act contains the grant of certain privileges by the public, to a private corporation, and in a matter where the public interest is concerned; and the rule of construction in all such cases is now fully established to be this: “That any ambiguity in the terms of the contract must operate against the corporation, and in favor of the public; and the corporation can claim nothing but what is clearly given by the act.” See *Charles River Bridge v. Warren Bridge*, 11 Pet. 544.

Construing this act with these principles in view, where do we find that the legislature have contracted to part with the power of constructing other railroads, even between Richmond and Fredericksburg, for carrying coal or other freight? Much less can they be said to have contracted that no railroad, connected with the western part of the State, shall be suffered to cross the complainants’ road, or run parallel to it, in any portion of its route. Such a contract cannot be elicited from the letter or spirit of this section of the act.

On the contrary, the preamble connected with this section
* 82] “shows that the complainants’ road was expected to “form a part of the main northern and southern route between the city of Richmond and the city of Washington;” and the inducement held out to those who should subscribe to its stock, was a monopoly “of transporting passengers” on this route, and this is all that is pledged or guaranteed to them, or intended so to be, by the act. It contains no pledge that the State of Virginia will not allow

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any other railroad to be constructed between those points, or any portion of the distance for any purpose; but only a road, "the probable effect of which would be to diminish the number of passengers travelling between the one city and the other, upon the railroad authorized by the act," or to compel the company to reduce the passage money.

That the respondents will not be allowed to carry the passengers travelling between the city of Richmond and the city of Washington, is admitted; and they deny any intention of so exercising their franchise as to interfere with the rights secured to complainants. That the parties will differ widely as to the construction of the grant owing to the ambiguity created by the use of the word "between," as it may affect the transportation of passengers travelling to or from the west, is more than probable. But on this application for an injunction against the construction of respondents' road, the chancellor was not bound to decide the question, by anticipation: And, although he may have thrown out some intimation as to his present opinion on that question, he has very properly left it open for future decision, to be settled by a suit at law, or in equity, "upon the facts of the case as they may then appear." But, however, probable this dispute or contest may be, it is not for this court to anticipate it, and volunteer an opinion in advance.

The act of 1848, authorizing the extension of the complainants' road, is silent as to any grant of power to transport passengers, so as to interfere with the pledge given to complainants; and it is sufficient for the decision of the case before us, to say, that the grant of authority to respondents to extend their road from the junction to the dock at the city of Richmond, does not, *per se*, impair the obligation of the contract contained in the 38th section of complainants' charter. The conditions annexed to the grant to respondents, by which the complainants were enabled to defeat it, cannot affect the question in any way. If the 38th section of the act of incorporation of complainants does not restrain the legislature from constructing another railroad for any purpose, parallel or near to the complainants', the respondents have a right to proceed with the construction of their road, and the state court was justified in refusing the injunction.

The counsel, very properly, have not insisted in their argument * in this court, on this point made in their bill, that [*83] the legislature had no power to authorize the construction of one railroad across another. The grant of a franchise is of no higher order, and confers no more sacred title, than a grant of land to an individual; and, when the public necessities require it, the one, as well as the other, may be taken for public purposes on making

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suitable compensation; nor does such an exercise of the right of eminent domain interfere with the inviolability of contracts. See *West River Bridge Company v. Dix*, 6 How. 507.

Leaving, therefore, the question as to the proper construction of the contract or rights guaranteed to the complainants by this section of their charter, to be settled when a proper case arises, we are of opinion that the state court did not err in refusing to enjoin respondents from constructing their road according to the authority given them by the act of assembly of 27th March, 1848, and that said act does not impair the obligation of the contract made with the complainants, in the 38th section of their act of incorporation. The judgment of the court of appeals of Virginia is therefore affirmed, with costs.

M'Lean, J., Wayne, J., and Curtis, J., dissented.

CURTIS, J. I have been unable to agree with the majority of the court in this case, and some of the principles on which a decision depends are of so much importance, as affecting legislation, that I think it proper to state my opinion and the reasons on which it rests.

That the 38th section of the complainants' charter contains a contract between the corporation and the State, the obligation of which the latter cannot impair by any law, must, I think, be admitted. Whether "An act for the extension of the Louisa railroad to the dock in the city of Richmond" does impair that obligation, depends upon the interpretation which the contract requires; and, inasmuch as it is the duty of this court to determine whether the obligation of the contract has been impaired, it is necessarily its duty to decide, what is the true interpretation of the contract.

The 38th section, with its preamble, are as follows:—

"And whereas, the railroad authorized by this act will form a part of the main northern and southern route between the city of Richmond and the city of Washington, and the privilege of transporting passengers on the same, and receiving the passage money, will, it is believed, be a strong inducement to individuals to subscribe for stock in the company, and the general assembly considers it just [* 84] * and reasonable that those who embark in the enterprise should not be hereafter deprived of that which forms a chief inducement to the undertaking,

"38. Be it therefore enacted and declared, and the general assembly pledges itself to the said company, that, in the event of the completion of the said railroad from the city of Richmond to the town of Fredericksburg, within the time limited by this act, the general

assembly will not, for the period of thirty years from the completion of the said railroad, allow any other railroad to be constructed between the city of Richmond and the city of Washington, or for any portion of the said distance, the probable effect of which would be to diminish the number of passengers travelling between the one city and the other, upon the railroad authorized by this act, or to compel the company, in order to retain such passengers, to reduce the passage money: Provided, however, that nothing herein contained shall be so construed as to prevent the legislature, at any time hereafter, from authorizing the construction of a railroad between the city of Richmond and the towns of Tappahannock or Urbana, or to any intermediate points between the said city of Richmond and the said towns; and provided, also, that nothing herein contained shall be construed to prevent the general assembly from chartering any other company or companies to construct a railroad from Fredericksburg to the city of Washington."

The preamble in effect declares what general object the parties have in view, and the section makes known to what extent and by what means that object is to be accomplished. That general object is to secure the corporation from being deprived of the passenger travel on its railroad; and the means of prevention are to prohibit for thirty years the existence of any other road, the probable effect of which would be to diminish the number of passengers travelling between Washington and Richmond upon the railroad of the complainants.

The first question is, whether what is called the extension of the Louisa road is a railroad, the probable effect of which would be to diminish those passengers; and this depends on what passengers are referred to in the contract.

It is maintained by the appellees that only passengers, travelling the distance between Washington and Richmond, are intended; but this is not consistent either with the substantial object of the parties, or with the language they have employed to make known their agreement. "The privilege of transporting passengers on the same and receiving the passage money," and protection from being "deprived of that which forms the chief inducement of the undertaking," would be but imperfectly secured if limited to one particular class of passengers only. Such a limitation, *inconsistent with [* 85] the apparent object of the parties, is not to be ingrafted on the contract unless clearly expressed. It is said that the words "passengers travelling between the one city and the other" contain this limitation, their meaning being passengers travelling from one city to the other. The word "between," in this clause, admits of that in-

terpretation, but does not require it. That word may also designate any part of the intermediate space, as well as the whole. It may be correctly said that the complainants' railroad is between Richmond and Washington, though it does not traverse the whole distance from one of those cities to the other, and the words which immediately follow, certainly tend strongly to show that it was in this last and more comprehensive sense the word "between" was here used. The whole clause is, "passengers travelling between one city and the other, upon the railroad authorized by this act." But the railroad there referred to, upon the completion of which this contract was to take effect, was only to be from Richmond to Fredericksburg, so that, strictly speaking, passengers could not travel to or from the city of Washington upon the railroad authorized by the act; they could thus pass over only a part of the intermediate space between Washington and Richmond. This clause, therefore, does not control the evident general intent of the parties to protect the passenger travel, but rather tends to make that general intent more clear. The question being whether the travellers referred to are only those going the whole distance, and one part of the descriptive words, designating where they are travelling, being ambiguous, and the other part, which points out how they are travelling, being clear, the result of the whole is to include all who travel in the intermediate space between the two cities, upon the complainants' railroad. And this construction is still further strengthened by the stipulation that the State will not authorize another road "to be constructed between the city of Washington and the city of Richmond, or for any portion of the said distance;" for if the object of parties was merely to protect the enjoyment by the complainants of the tolls derivable from passengers going from one of those cities to the other, it is highly improbable that the State would have agreed to this broad restriction. Construing the preamble and the section together, I think it was the intention of the parties to secure to the complainants, for the period of thirty years, the exclusive enjoyment of all the railroad passenger travel over every part of the line between Washington and Richmond; and that the mode of security agreed on by the parties was, that the State should not authorize the construction of any such railroad as might probably interfere with that exclusive enjoyment.

[* 86] * In coming to this conclusion, I have not overlooked the rule that grants from States to corporations of such exclusive privileges are to be construed most strongly against the grantees. But this rule, like its converse, *fortius contra proferentem*, which applies to private grants, is the last to be resorted to, and never to be relied upon, but when all other rules of exposition fail. *Bac. Max.*

reg. 3 ; 2 Bl. Com. 380 ; *Love v. Pares*, 13 East, 86. In *Hindekoper's Lessee v. Douglass*, 3 Cranch, 70, Chief Justice Marshall says : " This is a contract ; and, although a State is a party, it ought to be construed according to those well-established principles which regulate contracts generally." A grant such as is now in question, in consideration of the grantees risking their capital in an untried enterprise, which, if successful, will greatly promote the public good, in no proper sense confers a monopoly. It enables the grantees to enjoy, for a limited time, what they may justly be considered as creating. It is in substance and reality, as well as in legal effect, a contract, and, in my judgment, it is the duty of the court to give it such a construction as will carry it into full effect ; imposing on the public no restriction, and no burden, not stipulated for, and depriving the company of no advantage, which the contract, fairly construed, gives. This is required by good faith ; and to its demands all technical rules, designed to help the mind to correct conclusions, must yield. Having come to the conclusion that the intention of the parties to this contract was to secure to the complainants exclusive enjoyment of all railroad passenger travel over every part of the distance between Richmond and Washington for thirty years, and that the means adopted to effect this object was the promise of the State to authorize the construction of no railroad which might probably interfere with that exclusive enjoyment, the next inquiry is, whether the extension of the Louisa railroad to the dock in the city of Richmond would probably have that effect. This act enables the Louisa Railroad Company to extend their road from its junction with the complainants' road, at a point about twenty-four miles from Richmond, to that city, and thus to make another railroad between Richmond and that point on the complainants' road.

That this authority comes within that part of the restrictive stipulation which describes the route over which another railroad is not to be built, is clear, for it does authorize " another railroad," " for a portion of the distance " " between the cities of Richmond and Washington." But it is said that it does not come within the residue of the restrictive clause, because its probable effect will not be to diminish that passenger travel designed to be secured to the complainants. To this I cannot assent. The Louisa company, by their original charter, are * expressly authorized to [* 87] carry passengers on their railroad ; and when they are empowered, by the act now in question, to extend their road, it is a necessary implication that the extension is for the same uses, and subject to the same rights and powers and privileges as the original road, to which it is to be annexed. And accordingly we find that, by

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thé 5th section of this act, the legislature has prescribed a limit of tolls, as well for passengers as for merchandise, coming from, or going to another railroad, and passing over the whole length of the Louisa road and each part of it, including the extension.

Passengers, using the complainants' road between Richmond and the junction, may be divided into three classes. Those who travel the whole, or a part of the distance between Richmond and the junction, and do not go beyond the junction; those who do go to, or come from points beyond the junction on the complainants' road; and those who travel on the Louisa road, beyond the junction, going west, or coming east. The extension of the Louisa road is adapted to carry all these, and by the act complained of, the Louisa company is authorized to construct a road to carry them. It may certainly be assumed that a corporation, created to conduct a particular business for profit, will do all such business as it is its clear interest, and within its authority to do, and which it was created for the very purpose of doing. And if so, the effect of this extension must be to transport thereon a part of all these classes of passengers, and thus to diminish the number of those same classes of passengers, who, at the time of the passage of the act in question, used the complainants' road.

As to those passengers who do not use the Louisa road beyond the junction, I am at a loss to perceive any reason why they are not within the description of passenger travel designed to be secured to the complainants; and if they are excluded therefrom, I know of none who would be included, unless upon the interpretation already considered and rejected, that the contract was designed to embrace only passengers travelling the entire distance between Richmond and Washington. It is not absolutely necessary to go any further to find that this extension act impairs the obligation of the contract, by authorizing another road to be built, the probable effect of which would be, to diminish the number of passengers travelling on the complainants' road between the junction and Richmond. But it is clear to my mind, that the third class of passengers using the Louisa road, are as much within this contract as any others. To explain my views on this point, it is necessary to refer to a few dates.

The complainants were incorporated in February, 1834, [* 88] and their act of incorporation contained the compact * now relied on. Their road was completed and opened for use in January, 1837. In February, 1836, an act was passed incorporating the stockholders of the Louisa Railroad Company. In December, 1838, the Louisa road was opened for use to the Louisa court house, and from that time to March, 1848, the passengers, using the Louisa

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road, going to or coming from Richmond, and points between that city and the junction, passed over the road of the complainants. In March, 1848, the complainants and the Louisa company having differed concerning the tolls to be charged by the former on passengers and merchandise going to, or coming from the Louisa road, the legislature passed the "Act for the extension of the Louisa Railroad," which contains the following section: "Be it further enacted, that in case the Richmond, Fredericksburg, and Potomac Railroad Company shall, at the next annual meeting of the stockholders, stipulate and agree, from and after the expiration of the present contract with the Louisa Railroad Company, to carry all passengers and freight coming from the Louisa railroad from the junction to the city of Richmond, at the same rate per mile as may at the same time be charged by the Louisa Railroad Company on the same passengers and freight; and shall also agree to carry all passengers and freight entered at the city of Richmond for any point on the Louisa railroad, at the same rate per mile as is charged at the time for the same, by the Louisa Railroad Company; and shall also agree to submit to the umpirage of some third person or persons, to be chosen by the said companies, the compensation to the Richmond, Fredericksburg, and Potomac Railroad Company for collecting at the depots in Richmond, the dues of the Louisa Railroad Company, and any other matters of controversy which may arise between the said companies owing to the connection between them, then this act to be void, or else to remain in full force." It will thus be seen that the passenger travel, which it is the object of this act to take away from the complainants' road, had been *de facto* a part of its passenger travel between Richmond and the junction for about ten years. It is maintained that as the Louisa railroad, from the junction westward, was the cause of the existence of this travel upon the complainants' road, between Richmond and the junction, the Louisa corporation might be empowered to construct another road between those points for the purpose of doing that business. In other words, that passenger travel actually existing on the complainants' road, may properly be diminished by the construction of another road for a part of the distance between Richmond and Washington, provided it be done by a party who at some prior time was instrumental in increasing the passenger travel; * that we are to inquire whether, by this [* 89] new and competing road, any more is to be taken away than was brought by the corporation which builds it, and if not, then the competing road does not diminish the number of passengers, travelling on the complainants' road, within the fair meaning of this contract. I cannot give to this contract such a construction. It seems

to me to be at variance with its express terms, and with what must have been within the contemplation of the parties when it was entered into. The promise not to authorize any other railroad between Washington and Richmond, or for any part of that distance, the probable effect of which would be to diminish the number of passengers travelling on the complainants' railroad, is absolute and unqualified. It contains no reservation in favor of parties who have been instrumental in bringing that travel to the complainants' road. It extends over the period of thirty years, and applies to the travel actually existing thereon during every part of that period, to whatever causes its existence there may be attributable. It must have been contemplated by the parties that the number of travellers on the complainants' road would increase during the long period of thirty years; it must have been known to them that this increase would be likely to arise, among other causes, from the increased number of passengers coming laterally to the line, in consequence of the construction of other railroads, as well as from increased facilities of access by other means. They enter into a contract which by its terms protects this increased travel during the whole period, and by whatever causes produced, just as much as it protects the travel existing during the first month after the opening of the road. How then can we ingraft upon the contract an exception not found there, and say, that when it speaks generally of passengers travelling upon the road, it does not mean passengers which another railroad corporation has brought there? I am unable to see why not, as much as if a steamboat or stage company had brought them. In my opinion this class of passengers on the complainants' road, are as truly within the contract as any others; and a railroad, the object of which is to take away this class of passengers from the complainants' road, is one which the State has promised it would not authorize to be built.

Parties may agree, not only on the substantial rights to be protected, but on the particular mode of protecting them; and if they do agree on a particular mode, it becomes a part of their contract, which each party have a just right to have executed. In this compact, the parties have agreed on the mode of protection. It is, that the State will not authorize to be built any other railroad, which [* 90] would probably have the effect to diminish the * number of passengers on the complainants' road. It is the right to construct, and not the right to use, which the contract restrains. To say that the State may properly authorize a road to be built, the purpose of which is to carry passengers, and thus diminish the number of passengers on the complainants' road, but that the road, thus authorized, must not be used to the injury of the complainants' rights, is to

strike out of the contract the stipulation that such a road should not be authorized to be built. The power of the State to enable a corporation to build another road to carry merchandise only, seems to me to have nothing to do with this question. When the legislature shall adjudge that the public convenience requires another railroad there, to carry merchandise only, and that therefore the power of eminent domain may be exercised to build it, and when a company is found ready to accept such a charter, and risk their funds in its construction, then a case will arise under the power of the legislature to authorize a road for the transportation of merchandise only. But in the law now in question the legislature has not so adjudged; no such charter has been granted, or accepted, and no such road built; but one which the State is by its own promise restrained from authorizing. It seems quite aside from the true inquiry, therefore, to urge that the State might have empowered a company to make a railroad on which to transport merchandise only; for it has not done so.

It has been suggested by one of the defendants' counsel, that though the power of the legislature to enter into a compact for some exclusive privileges is not denied, yet that the legislature had not power to grant such privileges as are here claimed by the complainants, and therefore the State is not bound thereby. This is rested, not upon any express restriction on the powers of the legislature, contained in the constitution of Virginia, but upon limitations resulting by necessary implication from the nature of the delegated power confided by the people of that State to their government. But if, as must be, and is admitted, it is one of the powers incident to a sovereign state to make grants of rights, corporeal and incorporeal, for the promotion of the public good, it necessarily follows that the legislature must judge how extensive the public good requires those rights to be. Whether the State shall grant one acre of land, or one thousand acres; whether it shall stipulate for the enjoyment of an incorporeal right, in fee, for life or years; whether that incorporeal right shall extend to one, or more subjects; and what shall be deemed a fit consideration for the grant in either case, is intrusted to the discretion of the legislative power, when that discretion is not restrained by the constitution under which it acts. This has been the interpretation by all courts, and the practice under all * constitutions in the country, so far as I know, and it seems [* 91] to me to be correct. See *Piscataqua Bridge v. New Hamp. Bridge*, 7 N. H. Rep. 35, and cases there cited; *Enfield Bridge v. The Hart. & N. H. R. R. Co.* 17 Conn. R. 40; *Washington Bridge v. State*, 18 Conn. R. 53.

It remains to consider whether this court has jurisdiction to reverse the decision of the state court.

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The court of appeals having refused to entertain an appeal, the superior court of chancery of the Richmond circuit, was the highest court of the State, to which the complainants could carry the case; and it is to the decision of that court we must look. The questions are whether that court erroneously decided against a right claimed by the complainants under the constitution of the United States, and whether the bill was dismissed by reason of that erroneous decision. The points decided are set out with great clearness upon the face of the decree. Their substance is, that the construction of this extension road is lawful, the legislature having power to authorize it; that it may lawfully be used for the transportation of passengers, who, but for the existence of the Louisa road, would never have come on to the line of the Fredericksburg road; that whether the Louisa company will use the extension for the transportation of any other passengers, and thus infringe complainants' rights, does not appear; when the supposed case shall occur, it may be proper to interfere by injunction, if, upon the facts of that case as they shall appear, there is not a plain, adequate, and complete remedy at law.

It is clear, then, that the chancellor decided against the right claimed by the complainants, under the constitution, that this extension should not be constructed. In my opinion, this decision was erroneous. It is clear, also, that he decided against their right, under the constitution, to be protected in the enjoyment of the passenger travel coming upon their road, in consequence of the existence of the Louisa road. I think this was also erroneous. By reason of these decisions, the bill was dismissed. They left nothing but a case of contingent damage, which would not happen at all, if the Louisa company should carry only the passengers coming upon the line of the complainants' railroad by reason of the existence of the Louisa road; there was no certainty to what extent, or under which circumstances, or whether at all, the complainants' rights would be infringed.

Upon these views of the contract of the State, and the rights of the complainants, it necessarily followed that the bill was to be dismissed; for equity would not interfere in a case where the defendants had valuable rights and powers, which they might not [* 92] * exceed, and which they ought not to be restrained from exercising. But on the other hand, if the defendants had no such rights, or powers; if they were claiming them, and about to exercise them, in a manner certain to inflict great and continuing injury on the complainants, the extent of which injury a court of law could not fully ascertain, and could redress, even partially, only by a great multiplicity of suits, then no court of chancery would hesitate

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to grant relief. It is certain, therefore, that this bill was dismissed, by reason of, what I consider, the erroneous views taken by the chancellor, of the rights claimed by the complainant under the constitution of the United States.

It has been argued that by the local law of Virginia, contained in the general railroad act of that State, the chancellor had not jurisdiction to grant an injunction to restrain the construction of the extension road. If the chancellor had so decided and dismissed the bill, for that reason this court could not reverse that decision. But he did not so decide; and I cannot infer that he would so decide if this case were to be remanded, because I am of opinion that the statute relied on has no application to this case.

My opinion is, that the decree of the superior court of chancery should be reversed and the case remanded, with such directions as would secure to the complainants the remedy to which they are entitled, to prevent the violation of rights, secured to them by the constitution of the United States.

16 H. 416; 1 B. 358, 436.

HENRY PARISH, DANIEL PARISH, LEROY M. WILEY, JOHN R. MARSHALL, THOMAS P. NORRIS, and THOMAS PARISH, Merchants and Partners trading under the Firm and Style of PARISH AND CO., Appellants, v. CALEB MURPHREE, Administrator of GEORGE GOFFE, deceased; LOUISA C. GOFFE, THOMAS WILLIAMS, Jr., JOHN H. HENDERSON, Trustee, &c., MARTHA LUCY, ADDISON BOYKIN and Wife, ELIZABETH G. GOFFE, CALVIN NORRIS, and DAVID STRODER.

13 H. 92.

To avoid a post-nuptial settlement, insolvency need not be proved.

A merchant, largely indebted, and whose means of payment were subject to many contingencies, was not in a condition to make such a settlement of a large landed estate, and it is voidable by his creditors.

THE case is stated in the opinion of the court.

Volney E. Howard and *J. A. Campbell*, for the appellants.

Wilcox, contra.

* M'LEAN, J., delivered the opinion of the court. [* 97]

This is an appeal in chancery, from the district court of northern Alabama.

The bill was filed to set aside a deed of settlement, made by George Goffe, dated the 12th September, 1837, on his wife and four daughters, on the ground that it was made in fraud of creditors.

At the date above stated, Goffe and wife, by deed of general warranty, conveyed to Thomas Williams, Jr., six hundred and forty acres of land, including the "Blount Spring Tract," in Blount county, State of Alabama, for the consideration of sixty-four thousand dollars.

To secure the payment of the consideration, on the same day, Williams executed a deed of trust on the same property, to Joseph M. Goffe and George Goffe, for which notes bearing interest were given, five thousand dollars payable 1st March, 1838, five thousand payable on the 1st of October following, ten thousand the 1st of October, 1840, ten thousand the 1st of October, 1842, ten thousand the 1st of October, 1844, ten thousand the 1st of October, 1846, and fourteen thousand the 1st of October, 1848. Williams was to remain in possession of the land, and was authorized to sell parts of it, to meet the above payments.

On the same day, George Goffe executed a deed of settlement signed also by Joseph M. Goffe, by which he appropriated to his four daughters the four ten thousand dollars notes above stated, and the fourteen thousand dollars note to his wife, in consideration of "the natural love and affection he had for them."

The complainants represent that George and J. M. Goffe did business together as merchants, and that, on the 2d of February, 1837, they executed to them their promissory note for \$5,169, payable in thirteen months; and, on the same day, another note payable [* 98] in twelve months, for five thousand one hundred and *sixty-eight dollars and twenty-five cents; also another note on the 22d September, 1837, for \$953.25, payable nine months after date. On all which notes judgments were obtained in the district court, amounting to the sum of \$14,667.42, at November term, 1841. Executions having been issued on the judgments, were returned no property, and the defendants are alleged to be insolvent. And the complainants pray that George Goffe may be decreed to pay the amount due them, and, on failure to do so, that Williams may be decreed to pay the same, and in default thereof, that the lands and real estate or debts assigned to Mrs. Goffe and her children, may be converted into money, by sale or otherwise, so as to pay the sum due the complainants.

The defendants deny the allegations of the bill, and aver that, at the time of the settlement, the Goffes were able to pay their debts; that their assets exceeded their liabilities, and that the complainants have failed to collect their claims through their own negligence.

The statute of frauds of Alabama declares that "every gift, grant, or conveyance of lands, &c., or of goods or chattels, &c., by writing

or otherwise, had, made, or contrived of malice, fraud, covin, collusion, or guile, to the end or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, &c., shall be from henceforth deemed and taken only as against the person or persons, his, her, or their heirs, &c., whose debts, suits, &c., by such means, shall or might be in anywise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void," &c.

This statute appears to have been copied from the English statute of the 13th Elizabeth; and most of the statutes of the States, on the same subject, embrace substantially the same provisions. The various constructions which have been given to the statutes of frauds by the courts of England and of this country, would seem to have been influenced, to some extent, from an attempt to give a literal application of the words of the statute instead of its intent. No provision can be drawn so as to define minutely the circumstances under which fraud may be committed. If an individual being in debt, shall make a voluntary conveyance of his entire property, it would be a clear case of fraud; but this rule would not apply if such a conveyance be made by a person free from all embarrassments and without reference to future responsibilities. But between these extremes numberless cases arise, under facts and circumstances which must be minutely examined, to ascertain their true character. To hold that a settlement of a small amount, by an individual in independent circumstances, and which, if known to the public, would not affect his credit, is fraudulent, would be a perversion * of [* 99] the statute. It did not intend thus to disturb the ordinary and safe transactions in society, made in good faith, and which, at the time, subjected creditors to no hazard. The statute designed to prohibit frauds, by protecting the rights of creditors. If the facts and circumstances show clearly a fraudulent intent, the conveyance is void against all creditors, past or future. Where a voluntary conveyance is made by an individual free from debt, with a purpose of committing a fraud on future creditors, it is void under the statute. And if a settlement be made, without any fraudulent intent, yet if the amount thus conveyed impaired the means of the grantor so as to hinder or delay his creditors, it is as to them void.

In the case before us, two of the debts, exceeding ten thousand dollars, were contracted in February, 1837, seven months before the settlement deed was executed. The other debt of nine hundred fifty-three dollars and twenty-five cents, was contracted the 22d of September, ten days after the settlement. The property conveyed amounted to sixty-four thousand dollars, fifty-four thousand of which were covered by the settlement.

This conveyance is attempted to be sustained on the ground that Mrs. Goffe relinquished her dower to the tract conveyed, and that George Goffe, including the partnership concerns, held an aggregate property, after the settlement, amounting to the sum of sixty-five thousand dollars; and that the debts against Goffe individually, and also against the partnership, did not exceed twenty-five thousand dollars. It appears that in the fall of 1837, and in the early part of 1838, a large amount of his paper being due, at New York, including the plaintiff's, was not paid. Suits were commenced against him, and early in 1839, his property, within the reach of process, was all sold. Goffe, it is proved, sent to Texas in 1839, by his brother, ten negroes and other property, worth about ten thousand dollars. In 1840, George Goffe went to Texas, where he afterwards died. Twenty-seven judgments were rendered against him, four of which were on notes dated the 27th of February, 1837, and four on notes given in September and October following, independent of the plaintiffs' judgments.

These facts are incompatible with the assumption that Goffe's assets were more than double his liabilities. His aggregate of property must have been made of exaggerated values, and too low an estimate was made of his eastern debts. After the settlement, and, as it would seem, before it was known to his eastern creditors, his purchases of merchandise were large, and his business at home was greatly extended. Several stores were established by him in partnership with his brother. After having abstracted from his [* 100] means fifty-four thousand dollars, this *enlargement of his business shows a disposition to carry on a hazardous enterprise, at the risk of his creditors. In less than three years after the settlement, judgments were obtained against the partnership for between twenty-five and thirty thousand dollars; no inconsiderable part of which had been contracted and was due at the time of the settlement. These facts prove that, after the voluntary conveyance, Goffe was unable to meet his engagements. Nothing can be more deceptive than to show a state of solvency by an exhibit on paper of unsalable property, when the debts are payable in cash. Such property, when sold, will not, generally, bring one fifth of its estimated value. And such seems to have been the result in the case before us.

But to avoid the settlement, insolvency need not be shown nor presumed. It is enough to know that, when the settlement was made, Goffe was engaged in merchandising principally on credit; his means consisted chiefly of a broken assortment of goods, debts due for merchandise scattered over the country in small amounts, wild lands of little value, a few negroes, and a very limited amount of

improved real estate, the value of which was greatly over-estimated. On such a basis, no prudent man, with an honest purpose and a due regard to the rights of his creditors, could have made the settlement.

A conveyance under such circumstances, we think, would be void against creditors, at common law; and we are not aware that any sound construction of the statute has been given which would not avoid it. *Sexton v. Wheaton et ux.* 8 Wheat. 229; *Hinde's Lessee v. Longworth*, 11 Wheat. 199; *Hutchinson et al. v. Kelley*, 1 Robinson, Va. Rep. 123; *Miller v. Thompson*, 3 Porter's Rep. 196.

The decree of the district court is reversed, and the cause is remanded to that court, with instructions to enter a decree for the complainants as prayed for in the bill.

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EUGLID WILLIAMSON, THOMAS F. ECKERT, and JOHN WILLIAMSON,
Plaintiffs in *ETTOR, v. ALEXANDER B. BARRETT, ROBERT CLARK,*
NATHANIEL D. TERRY, HENRY LYNE, JAMES T. DONALDSON, WIL-
LIAM BROWN, and JOHN B. SPROWLE.

13 H. 101.

If a steamboat, injured by a collision on the Ohio, observed the customary rule, which requires a descending boat to keep the middle of the stream and stop her engines when meeting an ascending boat, she is not in fault for not backing, when it was uncertain whether the ascending boat would pass ahead or astern.

Damages for demurrage may be given in a collision case, and the rate of freight which a vessel would have earned, deducting expenses, is a proper measure.

THE case is stated in the opinion of the court.

Chase and Lincoln, for the plaintiffs.

Crittenden, (attorney-general,) *contra*.

* NELSON, J., delivered the opinion of the court. [* 106]

This is a writ of error to the circuit court of the United States for the district of Ohio.

The plaintiffs in the court below, the defendants here, who were the owners of the steamboat Major Barbour, brought an action against the defendants, the owners of the steamboat Paul Jones, to recover damages occasioned by a collision upon the Ohio River on the 3d February, 1848.

The Major Barbour was descending the river at the time, and The Paul Jones ascending, the latter heavily laden and of much larger size than the former.

Evidence was given by the plaintiffs, tending to show that their

boat was about in the middle of the river at the time the collision took place; that the defendants' boat was ascending the Indiana shore, and that, a short time before the collision, she suddenly changed her course and left the shore, running across the river into The Major Barbour, causing the damage in question. While on the part of the defendants, it was claimed, and evidence given to show, that the plaintiffs' boat was descending near the Indiana shore, and that the collision occurred near that shore, and that the plaintiffs' boat, a short time before it happened, suddenly turned out from the shore and ran across the bow of The Paul Jones, causing the damage.

Evidence was also given tending to show that the engine of the plaintiffs' boat was stopped, and the boat floated as soon as the danger was discovered, and for some time previous to the collision, but, it was admitted she did not back her engines, and it was claimed that she was not bound to do so, according to [*107] *the rules and usages of the navigation. While, on the part of the defendants, it was claimed, and evidence given to show, that The Paul Jones, some time before the collision, stopped her engines, and reversed the same to back the boat, and had made from one to three revolutions back, and was actually backing at the time of the collision; and also that the engines of the plaintiffs' boat were not stopped sufficiently early, and owing to that, and not attempting to back her engines, she contributed to the collision.

Evidence was further given tending to show, that boats navigating the Ohio River were bound to observe the following rules in passing each other: The boat descending, in case of apprehended difficulties, or collision, was bound to stop her engines, and float, at a suitable distance, so as to stop her headway; and the boat ascending, to make the proper manœuvre to pass freely.

When the evidence closed, the counsel for the defendants requested the court to instruct the jury, that the plaintiffs ought not to recover, if the collision could have been avoided by reversing the engines and backing their boat, in addition to stopping and floating; and, that the master was bound to use all the means in his power to prevent a collision.

And thereupon, the court, among other things, charged, that if The Major Barbour was in her proper track for a descending boat, near the middle of the river, and The Paul Jones in ascending the river was in her proper track near the Indiana shore, and the latter turned out of her proper course across the river or quartering, as stated by some of the witnesses, so as to threaten a collision; and that, as soon as discovered, The Major Barbour stopped her engine, rang her bell, and floated down the stream, as the custom of the

river required, leaving the ascending boat the choice of sides to pass her, and this being the law of the river, she was not, on the near approach of the boat, required to back her engine, as that might bring her in contact with the other boat. She had a right to presume The Paul Jones did not intend to run directly into her. And that, if any injury was done to The Major Barbour, the plaintiffs' boat, under such circumstances, by The Paul Jones running into her, the plaintiffs were entitled to recover.

The court further charged, that, if the jury should find for the plaintiffs, they ought to give such damages as would remunerate them for the loss necessarily incurred in raising the boat, and in repairing her; and also for the use of her during the time necessary to make the repairs, and fit her for business.

1. As to the first branch of the instruction. In order properly to appreciate it, it is material to notice the relative position of the two boats at the time of the collision, which is assumed in the instruction, and in respect to which circumstances it was given, and, as claimed by the plaintiffs, the jury would be warranted in finding. For, the principle stated was not laid down as an abstract proposition, or rule of navigation, but one applicable to the state of the case specially referred to as supposed to have been made out upon the evidence.

The case was this: The plaintiffs' boat was in her proper track, descending the river near the middle, while the defendants' was ascending the same in her proper track near the Indiana shore. And as the boats were approaching each other in this relative position, The Paul Jones, the defendant's boat, changed her course across the river towards the middle of the same, somewhat in an oblique direction according to some of the witnesses, and thereby endangering a collision. That as soon as this was discovered, The Major Barbour, the plaintiffs' boat, stopped her engine, rang her bell and floated, as the custom of the navigation required, leaving to the other boat the option to pass either her bow, or stern.

It was upon this state of facts, the court instructed the jury that the plaintiffs' boat was not bound to make the additional manoeuvre of backing her engines, as that might, under the circumstances, have brought about the collision she was endeavoring to avoid; and that, for the injury done by The Paul Jones running into her, the plaintiffs were entitled to recover.

The counsel for the defendants had requested the court to instruct the jury, that, if the plaintiffs' boat, by backing her engines in addition to stopping and floating, could have avoided the collision, she was bound to do so, and the defendants were not liable, as the mas-

ter was responsible for the use of all the means in his power to prevent it. And the error, supposed to have been committed, consists in the refusal to give this instruction, under the peculiar circumstances of the case, and in giving that which we have stated.

It is not to be denied, that The Major Barbour, according to the position of the boats as assumed in the instruction, had observed strictly the custom and usages of the river. But it is claimed that a state of facts had occurred from the position of The Paul Jones, whether by the fault of those in command or not, that made it the duty of the master of the plaintiffs' boat not sternly to have adhered to this usage, but, to have made the movement insisted upon, if by so doing the accident could have been avoided. This position is founded upon an exception to the general law of the navigation as modified by the circumstances of the particular case, by which the master of the vessel not in fault is bound to make every fair [* 109] and reasonable effort, *in the emergency, within his power, from due exercise of skill and good seamanship, to avoid, if possible, the impending calamity. Upon the water as upon the land, the law recognizes no inflexible rule, the neglect of which by one party, will dispense with the exercise of ordinary care and caution in the other. A man is not at liberty to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not use common and ordinary caution to avoid it. One person being in fault will not dispense with another's using ordinary care for himself.

And, undoubtedly, if a state of facts had been shown in this case, arising out of the circumstances attending the sudden change of the course of The Paul Jones, from which an inference might fairly have been drawn, that it was the duty of the master of The Major Barbour not only to have stopped her engines, but to have reversed them, and backed his boat, in order to avoid the danger, and that, by so doing, it might have been avoided, the point should have been put to the jury, with the instruction, if they so found, the plaintiffs could not recover. Before, however, any such instruction could be properly claimed, the defendants must have made out a state of the case to which it was applicable, and from which the omission to make the movement laid a foundation for the inference of fault on the part of The Major Barbour.

The fact that it would have prevented the catastrophe is not enough; circumstances must be shown that would make it the duty of the master to give the order.

There is no rule of law or of the river that imposes upon him, in such an emergency, the obligation to give a particular direction to

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his vessel, simply because it might avoid the danger. The question in all such cases is, whether, in the exercise of due care and caution in the management of her at the time in any given case, such a direction should have been given. If it should, then he is chargeable with the consequences of the neglect.

Applying these principles to the state of facts in respect to which the instruction in question was given, we think it will be found that no error was committed.

The defendants' boat had suddenly turned out of the accustomed track, which was along the Indiana shore, apparently for the purpose, if she had any in view, of crossing to the other side; and, as soon as this change was discovered, the engines of the descending boat were stopped, allowing her to float according to the usage in such cases, for the purpose of enabling the other to pass across her bow or stern, as she might elect.

Now, it could not be known, at least there is nothing in the * case to show that it was known to the master of the [* 110] descending boat, which of the two courses open to her the other intended to adopt. If she determined to pass his bow, undoubtedly, reversing the engines and backing his boat would have been a very proper manœuvre; but if she determined to cross his stern, the movement would have been improper, and might have been disastrous. Either a forward or backward movement under the circumstances would have embarrassed the operations of the other boat, as the master had a right to assume the one descending would adhere to the usage of the river, and leave him free to make choice of his course in passing upon that assumption.

Under these circumstances, we think it clear it would have been erroneous to have instructed the jury, that the master of The Major Barbour was bound not only to stop her engines, but to back her, if, by so doing, the danger could have been avoided. For, before the neglect to make that movement could be charged as a fault, it should have appeared that the master knew the colliding boat intended to pass her bow. In the absence of such knowledge, her proper position was that which the usage of the river prescribed, namely, to stop her engines and float, leaving the other the choice to pass across either her bow or stern. This was his plain duty, not only from the law of the river, but due, under the circumstances, to the other boat, as affording her the most favorable opportunity to extricate herself from the danger in which she had become involved by her own fault in carelessly leaving her proper track.

2. As to the question of damages.

The jury were instructed, if they found for the plaintiffs, to give

damages that would remunerate them for the loss necessarily incurred in raising the boat, and repairing her, and also for the use of the boat during the time necessary to make the repairs, and fit her for business.

By the use of the boat, we understand what she would produce to the plaintiffs by the hiring or chartering of her to run upon the river in the business in which she had been usually engaged.

The general rule in regulating damages in cases of collision is to allow the injured party an indemnity to the extent of the loss sustained. This general rule is obvious enough ; but there is a good deal of difficulty in stating the grounds upon which to arrive, in all cases, at the proper measure of that indemnity.

The expenses of raising the boat, and of repairs may, of course, be readily ascertained, and in respect to the repairs, no deduction is to be made, as in insurance cases, for the new materials in place of the old. The difficulty lies in estimating the damage sustained by the loss of the service of the vessel while she is undergoing the repairs.

[* 111] * That an allowance short of some compensation for this loss would fail to be an indemnity for the injury is apparent.

This question was directly before the court of admiralty in England, in the case of *The Gazelle*, decided by Dr. Lushington, in 1844, 2 W. Robinson, 279. That was a case of collision, and in deciding it, the court observed: " That the party who had suffered the injury is clearly entitled to an adequate compensation for any loss he may sustain for the detention of the vessel during the period which is necessary for the completion of the repairs, and furnishing the new articles."

In fixing the amount of the damages to be paid for the detention, the court allowed the gross freight, deducting so much as would, in ordinary cases, be disbursed on account of the ship's expenses in earning it.

A case is referred to, decided in the common-law courts, in which the gross freight was allowed without any deduction for expenses, which was disapproved as inequitable and exceeding an adequate compensation, and the qualification we have stated laid down.

This rule may afford a very fair indemnity in cases where the repairs are completed within the period usually occupied in the voyage in which the freight is to be earned. But, if a longer period is required, it obviously falls short of an adequate allowance. Neither will it apply where the vessel is not engaged in earning freight at the time. The principle, however, governing the court in adopting the freight which the vessel was in the act of earning, as a just measure

of compensation in the case, is one of general application. It looks to the capacity of the vessel to earn freight, for the benefit of the owner, and consequent loss sustained while deprived of her service. In other words, to the amount she would earn him on hire.

It is true, in that case, the ship was engaged in earning freight at the time of the collision; and the loss, therefore, more fixed and certain than in the case where she is not at the time under a charter-party, and where her earnings must in some measure depend upon the contingency of obtaining for her employment. If, however, we look to the demand in the market for vessels of the description that has been disabled, and to the price there, which the owner could obtain or might have obtained for her hire as the measure of compensation, all this uncertainty disappears. If there is no demand for the employment, and, of course, no hire to be obtained, no compensation for the detention during the repairs will be allowed, as no loss would be sustained.

But, if it can be shown that the vessel might have been chartered during the period of the repairs, it is impossible to deny that the owner has not lost in consequence of the damage, the amount which she might have thus earned.

* The market price, therefore, of the hire of the vessel [* 112] applied as a test of the value of the service will be, if not as certain as in the case where she is under a charter-party, at least, so certain that, for all practical purposes in the administration of justice, no substantial distinction can be made. It can be ascertained as readily, and with as much precision as the price of any given commodity in the market; and affords as clear a rule for estimating the damage sustained on account of the loss of her service, as exists in the case of damage to any other description of personal property, of which the party has been deprived.

In the case of *The Gazelle*, for aught that appears, the allowance of the freight afforded a full indemnity for the detention of the vessel while undergoing the repairs. This would be so, as already stated, if they were made within the period she would have been engaged in earning it. If it were otherwise, it is certain that the indemnity allowed fell short of the rule laid down under which it was made, which was, that the party was entitled to an adequate compensation for any loss he might sustain for the detention of the vessel during the period which was necessary for the completion of the repairs and furnishing the new articles.

The allowance of the freight she was earning at the time was but a mode of arriving at the loss in the particular case under the general rule thus broadly stated; and afforded, doubtless, full indemnity.

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We are of opinion, therefore, that the rule of damages laid down by the court below was the correct one, and is properly applicable in all similar cases. There was no question made in respect to the freight of the vessel, and hence the general principle stated was applicable, irrespective of this element, as influencing the result.

There were some other questions raised in the case of a technical character, and urged on the argument. But we deem it sufficient to say that they are so obviously untenable, that it is not important to notice them specially.

We are of opinion, therefore, the judgment of the court below was right, and should be affirmed.

Mr. Justice Catron dissented, with whom Mr. Chief Justice Taney, and Mr. Justice Daniel, concurred.

CATRON, J. This action is one of owners against owners of respective steamboats. It is an action on the case, in which no vindictive damages can be inflicted on the defendants, as they committed no actual trespass; and therefore, in assessing damages against them, moderation must be observed.

[*113] *In the next place, the collision occurred on the Ohio River, and the rules of law applicable to the controversy must accommodate themselves to that navigation.

The injured boat was sunk, and the plaintiffs declared for a total loss; but it came out in evidence that she was raised and repaired, and again commenced running the river. On this state of facts, the jury was charged: 1. That damages should be given for raising the boat: 2. For repairing her: and 3. Also damages in addition, "for her use during the time necessary to make the repairs and fit her for business."

The expression "for her use," must mean either the clear profits of her probable earnings; or, how much she could have been hired for to others during the time of her detention. Both propositions come to the same result, to wit: how much clear gain the owners of *The Major Barbour* could have probably made by their boat had she not been injured, during the time she was detained in consequence of being injured. This probable gain the jury was instructed to estimate as a positive loss, and to charge the defendants with it.

The suit is merely for loss of the boat, and has no reference to the cargo. It does not appear that she had either cargo or passengers; nor does the evidence show in what trade she was engaged.

In cases of marine torts, no damages can be allowed for loss of a market, nor for the probable profits of a voyage. The rule being too

uncertain in its nature to entitle it to judicial sanction. Such has been the settled doctrine of this court for more than thirty years.

In the case of *The Amiable Nancy*, 3 Wheat. 560, when discussing the propriety of allowing for probable loss of profits on a voyage that was broken up by illegal conduct of the respondents' agents, this court declared the general and settled rule to be, that the value of the property lost at the time of the loss, and, in case of injury, the diminution in value, by reason of the injury, with interest on such valuation, afforded the true measure for assessing damages. "This rule," says the court, "may not secure a complete indemnity for all possible injuries; but it has certainty, and general applicability to recommend it, and in almost all cases, will give a fair and just recompense." And in the suit of *Smith v. Condry*, 1 How. 35, it is declared that, in cases of collision, "the actual damage sustained by the party at the time and place of the injury, is the measure of damages." In that case there was detention as well as here, but it never occurred to any one that loss of time could be added as an item of damages. In other words, that damages might arise after *the injury, [* 114] and be consequent to it, and which might double the amount actually allowed.

The decision found in 3 Wheat. was made in 1818, and I had supposed, for many years past, the rule was established, that consequential damages for loss of time, and which damages might continue to accrue for months after the injury was inflicted, could not be recovered; and that there was no distinction in principle between the loss of the voyage, and loss of time, consequent on the injury.

The profits claimed and allowed by the circuit court depended on remote, uncertain, and complicated contingencies, to a greater extent than was the case in any one instance in causes coming before this court, where a claim to damages was rejected for uncertainty.

Here, full damages are allowed for raising the boat, and for her repairs. To these allowances no objection is made; it only extends to the additional item for loss of time. That the investigation of this additional charge will greatly increase the stringency, tediousness, and charges of litigation, in collision cases, is manifest; nor should this consideration be overlooked. The expense and harassment of these trials have been great when the old rule was applied, and the contest, if the rule is extended, must generally double the expense and vexation of a full and fair trial. Nor will it be possible, as it seems to me, for a jury or for a court, where the proceeding is by libel, to settle contingent profits on grounds more certain than probable conjecture. The supposition that the amount of damages can be easily fixed by proof of what the injured boat could have been hired

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for on a charter-party during her detention, will turn out to be a barren theory, as no general practice of chartering steamboats is known on the western rivers, nor can it ever exist; the nature of the vessels, and the contingencies of navigation, being opposed to it. In most cases, the proof will be, that the boat could not have found any one to hire her; and then the contending parties will be thrown on the contingency whether she could have earned something or nothing, little or much, in the hands of her owner during the time she was necessarily detained; and this will involve another element of contention of great magnitude, to wit, whether she was repaired in reasonable time. Forasmuch as no necessity will be imposed on the owner to hasten the repairs, as is now the case, he will rarely, if ever, do so, and having the colliding boat and her owners in his power, gross oppression will generally follow in applying this new and severe measure of damages to western river navigation.

In a majority of cases of collision on the western waters, [* 115] * partial injury, repairing, and detention of the injured boat occur. Contests before the courts have been numerous where the precise question of compensation here claimed was involved; and yet, in an experience of twenty-five years, I have never known it raised until now. The bar, the bench, and those engaged in navigation, have acquiesced in the rule that full damages for the injury at the time and place when it occurred, with legal interest on the amount, was the proper measure; nor do I think it should be disturbed; and that, therefore, the judgment of the circuit court should be reversed, because the jury were improperly instructed in this particular.

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DAVID D. MITCHELL, Plaintiff in Error, v. MANUEL X. HARMONY.

13 H. 115.

The plaintiff, in the train of one of the military expeditions from the United States, entered Mexico during the war with that country, for purposes of trade; after entering that country, his wagons and teams were taken possession of by the defendant, the second in command, under an order from the commanding officer of the expedition, and, in consequence, his goods were lost, and his teams and wagons destroyed. *Held*, 1. That as he entered the country to trade with the enemy by the permission of the commander, and under the sanction of the executive power of the United States, his property was not liable to seizure by law for such trading.

2. That mere rumors or suspicions of a design to quit the forces and join himself to the enemy, would not justify the seizure; the defendant must prove the fact that such illegal design existed.
3. That to justify the seizure, in order to prevent the property from falling into the hands of the enemy, or to appropriate it to the public defence, the danger must be immediate and instantly impending; and though the state of facts, as they appeared to the commander

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when he acted, must govern, and he is justified in acting on reasonable grounds of belief; yet, mere good intentions on his part, and a general desire to promote the public service, are not sufficient; his judgment must have been fairly exercised upon the case of necessity shown by the evidence before him, to take private property for the use of the expedition, or to prevent the enemy from using it.

After the plaintiff's property had been seized and taken out of his control, and carried to a distant place, whither he necessarily followed, his efforts to save it from loss, and offers to restore the possession to him, did not divest his right of action, or impose on him any duty of taking possession.

A military officer cannot rely on an apparently unlawful order of his superior, as a justification.

The courts of the United States have jurisdiction between proper parties, of an action of trespass, *de bonis asportatis*, committed in a foreign country.

Interest, at the rate of six per cent., from the time the judgment was signed in the circuit court, was allowed in this court as the proper measure of damages on the writ of error.

THE case is stated in the opinion of the court.

Crittenden, (attorney-general,) for the plaintiff.

Vinton, and *Cutting*, (with whom was *Moore*,) contra.

* TANEY, C. J., delivered the opinion of the court. [* 128]

This is an action of trespass brought by the defendant in error, against the plaintiff in error, to recover the value of certain property taken by him in the province of Chihuahua during the late war with Mexico.

It appears that the plaintiff, who is a merchant of New York, and who was born in Spain, but is a naturalized citizen of the United States, had planned a trading expedition to Santa Fé, New Mexico, and Chihuahua, in the republic of Mexico, before hostilities commenced, and had set out from Fort Independence, in Missouri, before he had any knowledge of the declaration of war. As soon as the war commenced, an expedition was * prepared under [* 129] the command of General Kearney, to invade New Mexico, and a detachment of troops was set forward to stop the plaintiff and other traders until General Kearney came up, and to prevent them from proceeding in advance of the army.

The trading expedition in which the plaintiff and the other traders were engaged, was, at the time they set out, authorized by the laws of the United States. And when General Kearney arrived they were permitted to follow in the rear and to trade freely in all such places as might be subdued and occupied by the American arms. The plaintiff and other traders availed themselves of this permission and followed the army to Santa Fé.

Subsequently, General Kearney proceeded to California, and the command in New Mexico devolved on Colonel Doniphan, who was joined by Colonel Mitchell, who served under him, and against whom this action was brought.

It is unnecessary to follow the movements of the troops or the traders particularly, because, up to the period at which the trespass is alleged to have been committed at San Elisario, in the province of Chihuahua, it is conceded that no control was exercised over the property of the plaintiff, that was not perfectly justifiable in a state of war, and no act done by him that had subjected it to seizure or confiscation by the military authorities.

When Colonel Doniphan commenced his march for Chihuahua, the plaintiff and the other traders continued to follow in the rear and trade with the inhabitants, as opportunity offered. But after they had entered that province, and were about to proceed in an expedition against the city of that name, distant about 300 miles, the plaintiff determined to proceed no further, and to leave the army. And when this determination was made known to the commander at San Elisario, he gave orders to Colonel Mitchell, the defendant, to compel him to remain with and accompany the troops. Colonel Mitchell executed the order, and the plaintiff was forced, against his will, to accompany the American forces with his wagons, mules, and goods, in that hazardous expedition.

Shortly before the battle of Sacramento, which was fought on the march to the town of Chihuahua, Colonel Doniphan, at the request of the plaintiff, gave him permission to leave the army and go to the *hacienda* of a Mexican by the name of Parns, about eight miles distant, with his property. But the plaintiff did not avail himself of this permission; and apprehended, upon more reflection, that his property would be in more danger there than with the army; and [* 130] that a voluntary acceptance on his part, and *resuming the possession at his own risk, would deprive him of any remedy for its loss if it should be taken by the Mexican authorities. He remained therefore with the troops until they entered the town. His wagons and mules were used in the public service in the battle of Sacramento, and on the march afterwards. And while the town remained in possession of the American forces he endeavored, but without success, to dispose of his goods. When the place was evacuated they were therefore unavoidably left behind, as nearly all of his mules had been lost in the march and the battle. He himself accompanied the army, fearing that his person would not be safe if he remained behind, as he was particularly obnoxious, it seems, to the Mexicans, because he was a native of Spain, and came with a hostile invading army.

When the Mexican authorities regained possession of the place, the goods of the plaintiff were seized and confiscated, and were totally lost to him. And this action was brought against Colonel

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Mitchell, the defendant, in the court below, to recover the damages which the plaintiff alleged he had sustained by the arrest and seizure of his property at San Elisario, and taking it from his control and legal possession.

This brief outline is sufficient to show how this case has arisen. The expedition of Colonel Doniphan, and all its incidents, are already historically known, and need not be repeated here.

At the trial in the circuit court the verdict and judgment were in favor of the plaintiff; and this writ of error has been brought upon the ground that the instructions to the jury by the circuit court, under which the verdict was found, were erroneous.

Some of the objections taken in the argument here, on behalf of the defendant, have arisen from a misconception of the instructions given to the jury. It is supposed that these directions embraced questions of fact as well as of law, and that the court took upon itself the decision of questions arising on the testimony, which it was the exclusive province of the jury to determine. But this is an erroneous construction of the exception taken at the trial. The passages in relation to questions of fact are nothing more than the inferences which in the opinion of the court were fairly deducible from the testimony, and were stated to the jury not to control their decision, but submitted for their consideration in order to assist them in forming their judgment. This mode of charging the jury has always prevailed in the State of New York, and has been followed in the circuit court ever since the adoption of the constitution.

The practice in this respect differs in different States. In some of them the court neither sums up the evidence in a charge to the jury nor expresses an opinion upon a question of fact. Its charge is strictly confined to questions of law, leaving the [* 131] evidence to be discussed by counsel, and the facts to be decided by the jury without commentary or opinion by the court.

But in most of the States the practice is otherwise; and they have adopted the usages of the English courts of justice, where the judge always sums up the evidence, and points out the conclusions which in his opinion ought to be drawn from it; submitting them, however, to the consideration and judgment of the jury.

It is not necessary to inquire which of these modes of proceeding most conduces to the purposes of justice. It is sufficient to say that either of them may be adopted under the laws of congress. And as it is desirable that the practice in the courts of the United States should conform, as nearly as practicable, to that of the State in which they are sitting, that mode of proceeding is perhaps to be preferred, which, from long-established usage and practice, has become the law

of the courts of the State. The right of a court of the United States to express its opinion upon the facts in a charge to the jury was affirmed by this court in the case of *M'Lanahan v. The Universal Insurance Co.* 1 Pet. 182, and *Games v. Stiles*, 14 Pet. 322. Nor can it be objected to upon the ground that the reasoning and opinion of the court upon the evidence may have an undue and improper influence on the minds and judgment of the jury. For an objection of that kind questions their intelligence and independence, qualities which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it, in questions of fact.

It was in pursuance of this practice, that the proceedings set forth in the exceptions took place. When the testimony was closed, and the questions of law had been raised and argued by counsel, the court stated to them the view it proposed to take of the evidence in the charge about to be given. And it is evident, from the statement in the exception, that this was done for the purpose of giving the counsel for the respective parties an opportunity of going before the jury, to combat the inferences drawn from the testimony by the court, if they supposed them to be erroneous or open to doubt.

It appears from the record that the counsel on both sides declined going before the jury, evidently acquiescing in the opinions expressed by the court, and believing that they could not be successfully disputed. And the judge thereupon charged the jury that if they agreed with him in his view of the facts, that they would find for the plaintiff, otherwise for the defendant; and upon this charge, the jury found for the plaintiff, and assessed the damages stated in [* 132] the proceedings. It is manifest, therefore, that * the circuit court did not, in its instructions, trench upon the province of the jury, and that the jury could not have been misled as to the nature and extent of their own duties and powers. The decision of the facts was fully and plainly submitted to them. And their verdict for the plaintiff, upon the charge given to them, affirms the correctness of the views taken by the court; and the opinions upon the evidence as therein stated must now be regarded as facts found by the jury; and as such are not open to controversy in this court.

This statement of the manner in which the case was disposed of in the circuit court, was necessary to disengage it from objections which do not belong to it, and to show what questions were decided by the court below, and are brought up by this writ of error. We proceed to examine them.

It is admitted that the plaintiff, against his will, was compelled by the defendant to accompany the troops with the property in question

when they marched from San Elisario to Chihuahua; and that he was informed that force would be used if he refused. This was unquestionably a taking of the property, by force, from the possession and control of the plaintiff; and a trespass on the part of the defendant, unless he can show legal grounds of justification.

He justified the seizure on several grounds.

1. That the defendant was engaged in trading with the enemy.
2. That he was compelled to remain with the American forces, and to move with them, to prevent the property from falling into the hands of the enemy.
3. That the property was taken for public use.
4. That if the defendant was liable for the original taking, he was released from damages for its subsequent loss, by the act of the plaintiff, who had resumed the possession and control of it before the loss happened.
5. That the defendant acted in obedience to the order of his commanding officer, and therefore is not liable.

The first objection was overruled by the court, and we think correctly.

There is no dispute about the facts which relate to this part of the case, nor any contradiction in the testimony. The plaintiff entered the hostile country openly for the purpose of trading, in company with other traders, and under the protection of the American flag. The inhabitants with whom he traded had submitted to the American arms, and the country was in possession of the military authorities of the United States. The trade in which he was engaged was not only sanctioned by the commander of the American troops, but, as appears by the record, was permitted by the executive department of the government, *whose policy it was to conciliate, by kindness and commercial intercourse, the Mexican provinces bordering on the United States, and by that means weaken the power of the hostile government of Mexico, with which we were at war. It was one of the means resorted to to bring the war to a successful conclusion.

It is certainly true, as a general rule, that no citizen can lawfully trade with a public enemy; and if found to be engaged in such illicit traffic his goods are liable to seizure and confiscation. But the rule has no application to a case of this kind; nor can an officer of the United States seize the property of an American citizen, for an act which the constituted authorities, acting within the scope of their lawful powers, have authorized to be done.

Indeed, this ground of justification has not been pressed in the argument. The defence has been placed, rather on rumors which

reached the commanding officer and suspicions which he appears to have entertained of a secret design in the plaintiff to leave the American forces and carry on an illicit trade with the enemy, injurious to the interests of the United States. And if such a design had been shown, and that he was preparing to leave the American troops for that purpose, the seizure and detention of his property, to prevent its execution, would have been fully justified. But there is no evidence in the record tending to show that these rumors and suspicions had any foundation. And certainly mere suspicions of an illegal intention will not authorize a military officer to seize and detain the property of an American citizen. The fact that such an intention existed must be shown; and of that there is no evidence.

The 2d and 3d objections will be considered together, as they depend on the same principles. Upon these two grounds of defence the circuit court instructed the jury, that the defendant might lawfully take possession of the goods of the plaintiff, to prevent them from falling into the hands of the public enemy; but in order to justify the seizure, the danger must be immediate and impending, and not remote or contingent. And that he might also take them for public use and impress them into the public service, in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise.

In the argument of these two points, the circumstances under which the goods of the plaintiff were taken, have been much discussed, and the evidence examined for the purpose of showing the nature and character of the danger which actually existed at the time or was apprehended by the commander of the American forces. But this question is not before us. It is a question of fact upon which the jury have passed, and their verdict has decided that a

[*134] danger or necessity, such as the court described, did not exist when the property of the plaintiff was taken by the defendant. And the only subject for inquiry in this court is, whether the law was correctly stated in the instruction of the court; and whether any thing short of an immediate and impending danger from the public enemy, or an urgent necessity for the public service, can justify the taking of private property by a military commander to prevent it from falling into the hands of the enemy or for the purpose of converting it to the use of the public.

The instruction is objected to on the ground, that it restricts the power of the officer within narrower limits than the law will justify. And that, when the troops are employed in an expedition into the enemy's country, where the dangers that meet them cannot always be foreseen, and where they are cut off from aid from their own

government, the commanding officer must necessarily be intrusted with some discretionary power as to the measures he should adopt; and if he acts honestly, and to the best of his judgment, the law will protect him. But it must be remembered that the question here, is not as to the discretion he may exercise in his military operations or in relation to those who are under his command. His distance from home, and the duties in which he is engaged, cannot enlarge his power over the property of a citizen, nor give to him, in that respect, any authority which he would not, under similar circumstances, possess at home. And where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own.

There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser. ✓

But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

*In deciding upon this necessity, however, the state of [*135] the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good.

But it is not alleged that Colonel Doniphan was deceived by false intelligence as to the movements or strength of the enemy at the time the property was taken. His camp at San Elisario was not threatened. He was well informed upon the state of affairs in his rear, as well as of the dangers before him. And the property was seized, not to defend his position, nor to place his troops in a safer one, nor to anticipate the attack of an approaching enemy, but to insure the success of a distant and hazardous expedition, upon which he was about to march.

The movement upon Chihuahua was undoubtedly undertaken from high and patriotic motives. It was boldly planned and gallantly executed, and contributed to the successful issue of the war. But it is not for the court to say what protection or indemnity is due from the public to an officer, who, in his zeal for the honor and interest of his country, and in the excitement of military operations, has trespassed on private rights. That question belongs to the political department of the government. Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it.

The case mentioned by Lord Mansfield, in delivering his opinion in *Mostyn v. Fabrigas*, 1 Cowp. 180, illustrates the principle of which we are speaking. Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of [* 136] some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law; and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed.

This case shows how carefully the rights of private property are guarded by the laws in England; and they are certainly not less valued nor less securely guarded under the constitution and laws of the United States.

We think, therefore, that the instructions of the circuit court on the 2d and 3d points were right.

The 4th ground of objection is equally untenable. The liability of the defendant attached the moment the goods were seized, and the

jury have found that the plaintiff did not afterwards resume the ownership and possession.

Indeed, we do not see any evidence in the record from which the jury could have found otherwise. From the moment they were taken possession of at San Elisario, they were under the control of Colonel Doniphan, and held subject to his order. They were no longer in the possession or control of the plaintiff, and the loss which happened was the immediate and necessary consequence of the coercion which compelled him to accompany the troops.

It is true, the plaintiff remained with his goods and took care of them, as far as he could, during the march. But whatever he did in that respect was by the orders or permission of the military authorities. He had no independent control over them.

Neither can his efforts to save them from loss, after they arrived at the town of Chihuahua, by sale or otherwise, be construed into a resumption of possession, so as to discharge the defendant from liability. He had been brought there with the property against his will; and his goods were subjected to the danger in which they were placed by the act of the defendant. And the defendant cannot discharge himself from the immediate and necessary consequences of his wrongful act, by abandoning all care and control of the property after it reached Chihuahua, and leaving the plaintiff to his own efforts to save it. He could not discharge himself without restoring the possession in a place of safety; or in a place where the plaintiff was willing to accept it. And the plaintiff constantly refused to take the risk upon himself, after they arrived at Chihuahua, as well as on the march, and warned Colonel Doniphan that he would not.

Neither can the permission given to the plaintiff to leave the troops and go to the hacienda of Parns, affect his rights. He * was then in the midst of the enemy's country, and to [* 137] leave the American forces at that point might have subjected his person and property to greater dangers than he incurred by remaining with them. The plaintiff was not bound to take upon himself any of the perils which were the immediate consequences of the original wrong committed by the defendant in seizing his property and compelling him to proceed with it and accompany the troops.

The fifth point may be disposed of in a few words. If the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant, even if the commander had abused his power, or acted from improper motives. But we have already said that the law did not confide to him a discretionary power over private property. ✓

Mitchell v. Harmony. 13 H.

Urgent necessity would alone give him the right; and the verdict finds that this necessity did not exist. Consequently, the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed. The case of Captain Gambier, to which we have just referred, is directly in point upon this question. And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify.

But in this case the defendant does not stand in the situation of an officer who merely obeys the command of his superior. For it appears that he advised the order, and volunteered to execute it, when, according to military usage, that duty more properly belonged to an officer of inferior grade.

We do not understand that any objection is taken to the jurisdiction of the circuit court over the matters in controversy. The trespass, it is true, was committed out of the limits of the United States. But an action might have been maintained for it in the circuit court for any district in which the defendant might be found, upon process against him, where the citizenship of the respective parties gave jurisdiction to a court of the United States. The subject was before this court in the case of *McKenna v. Fisk*, reported in 1 How. 241, where the decisions upon the question are referred to, and the jurisdiction in cases of this description maintained.

Upon the whole, therefore, it is the opinion of this court that there is no error in the instructions given by the circuit court, and that the judgment must be affirmed, with costs.

[* 138] * DANIEL, J., dissented.

In this case, I find myself constrained to disagree with the opinion of the court just pronounced. This disagreement is not so much the result of any view taken by me of the testimony in this case, in conflict with that adopted by my brethren; for, with respect to the character of the testimony, were that the subject regularly before us, there perhaps would exist little or no difference of opinion. With some modifications, perhaps unimportant, I might have agreed also to the legal propositions laid down by the court, so far as I have been able to extract them from the charge of the judge. My disagreement with the majority, relates to a great principle lying at the foundation of all legal inquiries into matters of fact; lying, indeed, at the foundation of civil society itself; the preservation, in its fullest scope and integrity, unaffected and even unapproached by improper

influences, direct or indirect, of the venerable, the sacred, the unappreciable trial by jury. In the remark just made, or in any criticism which may be attempted as to the charge of the judge at circuit, in this case, I would have it understood that there is no officer to whose learning, or to whose integrity of purpose, I would with greater confidence intrust either the rights of the citizen, or the exposition of the law, than I would to the judge whose opinion is before us; but in this instance, it seems to me, that in accordance with a practice which, although it has obtained in some of the courts, is regarded as irregular and mischievous, he has stepped beyond the true limits of the judicial province. Duty demands of me, therefore, however ineffectual the effort, that I should oppose my feeble resistance to the aggression.

I object to the charge of the judge in this case, as I would to every similar charge of a court presiding over a jury trial at common law, because it is not confined to a statement of the points of law raised by the pleadings, and to the competency or relevancy of the testimony offered by either party in reference to those points; but extends to the weight and efficiency of the evidence, all admissible, and in fact admitted, and declares to the jury minutely and emphatically, what that testimony does or does not prove. And now let us examine the language of the charge. It is as follows:—

“One ground on which the defence is placed is, that the plaintiff was engaged in an unlawful trade with the public enemy, and that, being engaged in an unlawful trade, his goods were liable to confiscation; and any person, particularly an officer of the army, could seize the same.

This ground, as I understand the evidence, has altogether failed. He was not only not so engaged, but was engaged in trading *with that portion of the territory reduced to subjection by [* 139] our arms, and where his trading with the inhabitants was permitted and encouraged. The army was directed to hold out encouragement to the traders. There is no foundation, therefore, for this branch of the defence. Another ground taken by the defendant, and relied upon, depends upon another principle of public law, namely, the taking possession of the goods at a time and place when it was necessary for the purpose of preventing them from falling into the hands of the enemy. This has been urged as particularly applicable to the plaintiff's goods, some of which consisted of articles which might be used as munitions of war, wagons for transportation, &c.

Taking the whole of the evidence together, and giving full effect to every part of it, we think this branch of the defence has also failed.

No case of peril or danger has been proved which would lay a

foundation for taking possession of the goods of the plaintiff at San Elisario, on that ground, either as it respects the state of the country, or the force of the public enemy. On the contrary, it was in the possession of the arms of this government. There was no enemy, no public force at the time in the neighborhood, which put the goods in the danger of being captured. The plaintiff's goods, therefore, stood in the same condition as the goods of any other trader in the country. The testimony does not make out a case of seizure of property justified by the peril of its falling into the enemy's hands. The peril must be immediate and urgent, not contingent or remote; otherwise every citizen's property, particularly on the frontiers, would be liable to be seized or destroyed, as it must always be more or less exposed to capture by the public enemy. The principle itself, if properly applied, of the right to take property to prevent it from falling into the hands of the enemy, is undisputed. But in this case there was no immediate or impending danger, no enemy advancing to put the goods in peril. They were more exposed to marauding parties than to any public force, the danger from which the plaintiff considered himself able to take care of. The next ground of defence, and which constitutes the principal question in the case, and upon which it must probably ultimately turn, is the taking of the goods by the public authorities for public use. I admit the principle of public law; but this rests likewise upon the law of necessity. I have no doubt of the right of a military officer, in a case of extreme necessity, for the safety of the government or of the army, to take private property for the public service.

An army upon its march, in danger from the public enemy, would have a right to seize the property of the citizen, and use [* 140] * it to fortify itself against assault while the danger existed and was impending, and the officer, ordering the seizure, would not be liable as a trespasser; the owner must look to the government for indemnity. The safety of the country is paramount, and the rights of the individual must yield in case of extreme necessity. No doubt, upon the testimony, if the enemy had been in force, in the neighborhood of the United States troops, with the disparity which existed at Sacramento, and the same danger for the safety of the troops existed at San Elisario that threatened them there, the commanding officer might, for the safety of this army, seize and use, while the danger continued, the wagons and teams of the plaintiff that could be immediately brought into the service, to meet and overcome the impending danger. An immediate, existing, and overwhelming necessity would justify the seizure for the safety of the army.

Looking, however, at the testimony, it seems to me quite clear that these goods were seized, not on account of any impending danger at the time, or, for the purpose of being used against an immediate assault of the enemy, by which the command might be endangered, but that they were seized and taken into the public service for the purpose of coöperating with the army in their expedition into the enemy's country, to Chihuahua. The mules, wagons, and goods were taken into the public service for the purpose of strengthening the army, and aiding in the accomplishment of the ulterior object of the expedition, which was the taking of Chihuahua; it was not to repel a threatened assault, or to protect the army from an impending peril; in my judgment, all the evidence taken together does not make out an immediate peril or urgent necessity existing at the time of seizure which would justify the officer in taking private property and impressing it into the public service; the evidence does not bring the case within the principle of extreme necessity; it does not make out such a case, or one coming within the principle; there is not only no evidence of an impending peril to be resisted by the public force, but the goods were taken for a different purpose, namely, for the purpose of co-operating with the army against Chihuahua; the army had to march over 200 miles before it reached or found the enemy; the danger, if any, lay in the pursuit, not in remaining at San Elisario or returning to Santa Fé; there had been a sudden insurrection against the authority of the government in that neighborhood, but it was immediately suppressed.

As to the remaining grounds of defence, the liability of the defendant for taking the goods and appropriating them to the public service accrued at the time of the seizure; if it was an unlawful taking, the liability immediately attached, and the * question was, whether that liability had been discharged [* 141] or released by any subsequent act of the plaintiff; Colonel Mitchell, who executed the order, was not alone responsible; Colonel Doniphan, who gave the order, was also liable; they were jointly and severally responsible; then, was any act done by the plaintiff which waived the liability, or by which he resumed the ownership and possession of the goods? Certainly, the abandonment of the goods to Colonel Doniphan cannot be regarded as an act of resumption of ownership; on the contrary, it was consistent with the assertion of his liability; there had been a negotiation between them; Colonel Doniphan advised him to sell the goods at Chihuahua and look to the government for indemnity, and, in pursuance of this, measures were taken for their protection and safe-keeping. I doubt if there be any evidence showing an intent on the part of the plaintiff to resume

ownership over the goods as his private property after they had been seized by the army, or any act done by him that would, when properly viewed, lead to that result."

The bill of exceptions concludes as follows:—

"After the judge expressed his views of the case as above stated, the counsel on both sides declined going to the jury.

The presiding judge accordingly charged the jury that the law was as had been stated by him; and that, if they agreed with him in his view of the facts, they would find for the plaintiff; otherwise for the defendant.

The counsel for the defendant did then and there except to each of the four propositions mentioned in the charge above stated.

The jury, without leaving their seats, returned a verdict for the plaintiff for \$90,806.44.

And because none of the said exceptions, so offered and made to the opinions and decisions of the said associate justice, do appear upon the record of the said trial; therefore, on the prayer of the said defendant, by his said counsel, the said associate justice hath to the bill of exceptions set his seal, April term, one thousand eight hundred and fifty.

S. NELSON. [SEAL.]

The record, above cited, informs us that, after the judge had expressed his views of the case as above stated, the counsel on both sides declined going to the jury. And surely, after such an expression, no other result could well have been anticipated. In the first place, the counsel for the plaintiff could not have made to the jury so authoritative an argument in behalf of his client; and in the next place the counsel for the defendant must have been a rash man could he have attempted to throw his individual weight (whatever might

have been his ability) in opposition to this authoritative [* 142] declaration and influence of the court. Nay, *it may be insisted, that if the court, in passing upon the weight of the evidence, was acting within its legitimate sphere, the counsel would have been justly obnoxious to the imputation of indecorum, if not of contempt, in assailing before the jury the judge's decision; for the respective provinces of the court, the counsel, and the jury, are separate, distinct, and well defined, and neither should be subject to invasion by the other.

But after the counsel had been thus silenced, and the weight of the evidence fully and minutely pronounced upon by the court, it is insisted, that the alleged irregularity was entirely cured, by a declaration from the court to the jury, "that if they agreed with him in his view of the facts, they should find for the plaintiff, otherwise they

might find for the defendant." But the natural and obvious inquiry here is, what the judge's view of the facts had to do with this matter. It was the jury who were to find the facts for the judge, and not the judge who was to find the facts for the jury; and if the verdict is either formally, or in effect, the verdict of the judge, it is neither according to truth nor common sense, the verdict of the jury; and these triers of fact had better be dispensed with, as an useless, and indeed an expensive and cumbersome *formula* in courts of law, than be preserved as false *indica* of what they in reality do not show. Moreover, this determination of facts by the court does not place the parties upon fair and equal grounds of contest before the minds of the jury; it is placing the weight of the court, which must always be powerfully felt, on the side of one of the parties, and causing the scale necessarily to preponderate by throwing the sword, which, under such circumstances, can hardly be called the sword of justice, into one of the scales in which the rights of the parties are hanging.

The practice of passing upon the weight of the evidence and of pronouncing from the bench what that evidence does or does not prove, accords neither with the nature and objects of jury trial, as indicated by its very name, nor as affirmed by the fathers of the law who have defined this institution and proclaimed it to be the ark of safety for life, liberty, and property. Thus it is called the trial *per pais*, or by the country, to distinguish it as a determination of the rights of the subject or citizen by his fellow subjects or citizens, from a determination thereon by the action of mere officials or creatures of the government. And with respect to the peculiar intent and effects of this tribunal of the people we read thus: Justice Blackstone, speaking of this institution, says: "The trial by jury has ever been, and, I trust, ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when *it is applied to criminal cases! It is the [*143] most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected, either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." Again he says: "Great as this eulogium may seem, it is no more than this admirable constitution, when traced to its principles, will be found in sober reason to deserve. The impartial administration of justice, which secures both our persons and our property, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices in the

State, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity. It is wisely ordered, therefore, that the principles and axioms of law, which are general propositions flowing from abstracted reason, and not accommodated to times or men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here, partiality can have little scope; the law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of facts preëstablished. But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder." And again: "Every new tribunal erected for the decision of facts without the intervention of a jury, (whether composed of justices of the peace, commissioners of the revenue, or judges of a court of conscience, or any other standing magistracy,) is a step towards establishing aristocracy, the most oppressive of absolute governments. It is, therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain, to the utmost of his power, this valuable constitution in all its rights; to restore it to its ancient dignity if at all impaired by the different value of property, or otherwise deviated from its first institution; and above all, to guard it against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretences, may in time imperceptibly undermine this best preservative of English liberty."

With regard to the legitimate and proper mode of operation, and effect of the trial by jury, the language of Lord Coke should ever be kept in mind, as furnishing the true and only true standard by which to measure this valuable institution. After giving his derivation of the terms verdict and judgment, *this great common lawyer proceeds, "Et sicut ad quæstionem juris, non respondent juratores sed iudices; sic ad quæstionem facti, non respondent iudices sed juratores." For jurors are to try the fact, and the judges ought to judge according to the law that ariseth upon the fact, for *ex facto jus oritur*. The manner of stating the above propositions by this great lawyer and commentator, is worthy of particular attention, as defining and illustrating with clearness and precision, the powers and duties of the court and the jury. He has not simply said, *ad quæstionem juris respondent iudices*, nor in like manner *ad quæstionem facti, respondent juratores*, but he has placed them in a

striking opposition and contrast, and drawn a well-defined limit around the functions of both the court and the jury, and informed them, in terms too unequivocal for misapprehension, that the limit, thus prescribed, neither has the power to transcend; has declared to each what it shall not do. Thus, literally translated, his annunciation is: "And as with respect to the questions of law, the jury must not respond, but only the judges; so, or in like manner, or under like restriction, the judges must not respond to questions of fact, but only the jury." There can be no escape from the force of the positions thus laid down by Lord Coke, by the argument that the jury are not absolutely bound by the opinion pronounced by the court upon the weight of the evidence. The proper inquiry here is, not as to the absolute and binding authority of the court's opinion upon the weight of evidence; but that inquiry is, what are the legitimate and appropriate functions of the court and the jury; whether the former, in pronouncing upon the weight of the evidence, can, within any rational sense, be responding only to questions of law, or whether it is not controlling the free action of the jury by the indirect exertion of a power which all are obliged to concede that it does not legitimately possess; the power of responding to the facts of the case. This is one of the mischievous consequences against which we are assured, by Justice Blackstone, that the trial by jury was designed to guard, when he remarks that, "in settling and adjusting a question of fact when intrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder." And if this power of interpretation or of weighing the evidence cannot safely be deposited within the regular commission of the judge, much less should an attempt to wield that power be tolerated, when confessedly beyond his commission. The objection here urged to the interposition of the court as to the weight of evidence, is by *no means weakened by the excuse or [* 145] explanation that such declaration by the court is not binding, but is given in the way of advice to the jury; the essence of the objection is perceived in the control and influence which an interposition by court is almost certain to produce upon the otherwise free and unembarrassed action of the jury, and the restraint it imposes upon the views and efforts of the advocate, who, in a great majority of instances, will hardly venture to throw himself openly into a conflict with the court. And again, the maxim which declares that *ad questionem facti non respondent iudices*, would seem to forbid this advice altogether, or to render it officious or irregular at least. The

court can exercise a legitimate and effectual control over the verdict of juries by the award of new trials, and should be restricted to this regular exertion of its acknowledged power. Let us test this interposition by the court, by comparing it with a similar irregularity on the part of the jury. *Ad quæstionem juris non respondent juratores sed judices*, says the maxim. Now, suppose the jury sworn in a cause should declare to the court what evidence was competent or relevant to the issues they were to try, and what, in their view, should be the law governing the contest between the parties. Would not such a proceeding be regarded as extremely irregular and wholly unjustifiable? And why would it be so regarded? Simply because in so acting the jury would transcend the province assigned them by their duty; because they would not be conforming to the maxim *ad quæstionem legis non respondent juratores sed judices*. And yet, perhaps, there would be greater color for this proceeding than can be found to excuse the interference by the court in questions of fact; for it is undeniable that from the earliest periods of the practice of jury trials, the jury, of right, could find a general verdict, thereby constituting themselves judges both of law and fact.

In accordance with the maxim quoted from Lord Coke, may be cited other authorities of great weight. Thus, in the case of *Rex v. Poole*, to be found in cases in the king's bench, in the time of Lord Hardwicke, (23,) it is said by Hardwicke, C. J., that "it is of the greatest consequence to the law of England, and to the subject, that the powers of the judge and the jury be kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England." So likewise in *Foster*, p. 256, it is said, that "the construction of the law, upon the facts found by the jury, is in all cases undoubtedly the proper province of the court." It has been said, that the course pursued by the judge in this case is in conform-

ity with the practice of the courts of England, and in the [* 146] *majority of the States of this Union. For the establishment of the position assumed, either with regard to the English courts, or with respect to the tribunals of the several States, no authorities have been cited; but, even if this position should be conceded, it is not the less clear that the rule it is invoked to sustain is a flagrant departure from the great principle so emphatically asserted by the fathers of the law, and should not the less be viewed and shunned as an abuse rather than an example worthy of imitation. In what number of States of this confederacy such a practice (such an abuse, as I would term it,) may prevail, has not been shown; certain it is, that in many of the southern States it does not obtain, and

would not be tolerated. It has also been said, that the right of the judge to instruct the jury upon the weight of testimony has been ruled as the established doctrine of this court. If this be so, it is a revelation which the friends of jury trial, in its full integrity and independence, will grieve to learn, and will be disposed to regard as a demolition by this court of that sacred ark of civil liberty, for which, by the greatest services it may render, it can hardly ever be able to atone. It is true that, in the case of *Carver v. Jackson*, 4 Pet. 80, there is an expression of Mr. Justice Story, in delivering the opinion of the court, broad enough to cover this irregular exercise of power by the court in its widest extent. But, upon examination, it will be seen that this expression had no real connection with the points regularly before the court, and, as a mere *dictum*, was entirely without authority. In the introductory part of his opinion, Mr. Justice Story, meaning merely to express his disapprobation of a practice of bringing up for review the entire charge of the court below, without stating specific points or grounds of exception, as extremely inconvenient, takes occasion to use the following remark, namely, — that, “with the charge of the court to the jury upon mere matters of fact, and with its commentaries upon the weight of evidence, this court has nothing to do.” But it is remarkable that this judge goes on to say, with respect to these commentaries, that they are of no binding legal effect; thus, in reality, pronouncing their condemnation in the same breath which sanctions their admission to affect, if it can be done without legal or binding obligation, the minds of the jurors. Surely, it may be assumed as a postulate, that a court of justice, in adjudicating upon the rights of the citizen or of the State, should do, and can have power to do, nothing which is irregular, or vain, or useless. Its duty and its office is to do the law, and nothing but the law. The anomalous and contradictory doctrine above noticed has, I think, been condemned by a more recent and a far more correct decision of this court; a decision * directly in point upon this subject,— [* 147] I allude to the case of *Hanson v. Eustace*, 2 How. 706. In that case, the late Justice Baldwin, under the rule which admits of secondary evidence when the primary evidence is not within the power of a party, or is withheld improperly by his adversary, went so far beyond the just application of the rule as to say to the jury what the secondary or presumptive evidence did actually prove; but still, accompanied his declaration with the salvo, “that if they agreed with him in opinion.” This is his language: “Should your opinion agree with ours on this point, you will presume that there was a deed from Robert Phillips, or his heirs, competent to vest the title to the sixth street lot in the firm of Robert and Isaac Phillips; that it so remained

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But it is not sufficient to avoid it that the debtor should have contemplated a state of insolvency; he must have contemplated an act of bankruptcy, or an application by himself to be declared a bankrupt, at the time when he gave the power of attorney.

The giving of such a power of attorney is not, *per se*, an act of bankruptcy, unless done willingly, or fraudulently; and it is not fraudulent, if the donee be a *bond fide* creditor, unless the debtor contemplated bankruptcy in the sense above explained.

The addition of the current rate of exchange to the legal rate of interest is not usury, because the former is taken, not for the loan or forbearance of the money, but as a compensation for receiving it at a place where it is expected to be less valuable, than at the place where the loan is made.

THE case is stated in the opinion of the court.

Read, for the appellants.

Chase and Rockwell, for the bank.

A motion was made to dismiss the appeal.

M'LEAN, J. This is an appeal from the circuit court of the Ohio district, and a motion is made to dismiss it on two grounds.

1. Because no citation has been issued.

2. "Because the appeal is from the decree of 1848 and interlocutory decrees, whereas all the matters contested by the appellants were finally adjudicated and decreed at the November term, 1846, from which decree an appeal was taken which was dismissed by this court, and no appeal has been since taken."

At November term, 1846, a decree was entered against the appellants. In January term, 1847, an appeal was prayed by them from that decree, which was granted, and bond was given. But the appellants failing to file the record and docket the cause in this court, as required by the rules, it was, on motion of the appellee's counsel, docketed and dismissed at December term, 1847. At the same term a motion was made to reinstate the cause upon the docket, which motion was overruled.

* Afterward, at October term, 1849, the appellants prayed [* 151] an appeal from the final decree made at the November term, 1848, which was granted, and that is the appeal which is now pending.

It seems that no notice of this appeal has been served on the appellee, and on that ground the motion to dismiss is made. A general appearance was entered by the counsel for the appellee at December term, 1850, but the motion to dismiss was not filed until February, 1852. In the case of *McDonough v. Millaudon*, 3 How. 707, a motion was made to dismiss the cause on the ground that the clerk of the supreme court of Louisiana issued the writ of error, and signed the

citation; and the court said: "This case has been here for two terms; a writ of *certiorari* has been sent down, at the instance of the defendant in error, in whose behalf the motion is made, to complete the record; he now moves to dismiss for the first time, and we think he comes too late."

The object of a citation on a writ of error or an appeal is to give notice of the removal of the cause, and such notice may be waived by entering a general appearance by counsel. Where an appearance is entered, the objection that notice has not been given is a mere technicality, and the party availing himself of it, should, at the first term he appears, give notice of the motion to dismiss, and that his appearance is entered for that purpose. A delay to give this notice may throw the other party off his guard, until the limitation of the writ of error or the appeal may have expired. In this case we think the motion is made too late.

The record appeal was regularly taken and perfected. By this appeal all the questions are brought before us, which were decided to the prejudice of the appellants. From the nature of the controversy until the final decree was entered, as between all the parties, the case could not, properly, be brought before this court. The motion to dismiss is overruled.

Afterwards, the case was argued on its merits.

[* 163] * CURTIS, J., delivered the opinion of the court.

Nathaniel C. McLean, as the assignee of John Mahard, Jr., a bankrupt, filed his bill in the circuit court of the United States for the district of Ohio, for the purpose of relieving property of the bankrupt from incumbrances thereon, alleged to have been created in fraud of the bankrupt act. A final decree having been entered in the cause, John S. Buckingham and Mark Buckingham, parties defendant to the bill, have prosecuted this appeal.

They allege that the decree of the circuit court was erroneous in three particulars.

The first is, that the title of John S. Buckingham to forty-nine shares of the stock of the Lafayette Bank has been declared
[* 164] * to be subject to an incumbrance thereon in favor of the bank, whereas John S. Buckingham had the better title thereto.

The amended bill states: "That said Mahard, before and at the time of filing his petition to be declared bankrupt, was the owner of forty-nine shares, of one hundred dollars each, of the capital stock of the Lafayette Bank of Cincinnati; that the said Lafayette Bank and John S. Buckingham set up some claim to said forty-nine shares of stock, of the particular nature of which your petitioner

is ignorant. And your petitioner charges, that neither said Lafayette Bank, nor John S. Buckingham, have any valid legal claim to said shares of stock, but that petitioner, assignee, &c., is justly entitled thereto."

The answer of the bank responds to this allegation in the bill: 'That said John Mahard was the owner of forty-nine shares of the capital stock of the bank of these respondents, on each of which the sum of one hundred dollars had been paid; that he became the owner of said shares, so far as these respondents are advised, on the 13th day of September, 1841, and afterwards transferred the same to the cashier of said bank, as collateral security for the debt of J. and W. Mahard to these respondents, and these respondents now claim to have the control of said shares in virtue of said transfer, and also in virtue of their lien upon the capital stock of said bank, owned by debtors to the same, which lien is created and confirmed by the charter granted to these respondents by the legislature of the State of Ohio."

John S. Buckingham and Mark Buckingham both demurred to this amendment of the bill. Their demurrer was overruled; but no answer to this particular allegation was filed by either of them; and the record contains no evidence, introduced by any party, touching the title to this stock. In this state of the record it is most manifest, only one decree could be made. The bank, in response to the allegations of the bill, having disclosed two titles to this stock, either of which was sufficient, if valid, and the assignee having shown nothing to impeach either title, his claim could not be allowed; and John S. Buckingham, being entirely silent respecting the charge in the bill, that he makes some claim to this stock, does, in effect, make none in this cause, and cannot complain of a decree for not awarding to him what he does not appear to have claimed.

The second objection made by the appellants to the decree is, that it declares their title to certain moneys, made by the levy of an execution, in their favor, on personal property of the bankrupts, to be invalid, as against the assignee.

On the 7th of April, 1842, a power of attorney to William M. Corry, Esq., to confess a judgment against the mercantile firm *of the bankrupts, in favor of John S. Buckingham, [* 165] for the sum of fourteen thousand eight hundred dollars, was executed by John Mahard, Jr., for himself and his copartner, William Mahard, who was at the time in New Orleans. By virtue of this power, a judgment for that sum was confessed on the 8th of April. On the 20th of April, William Mahard, by an instrument under seal which recited the substance of this power, and that it was given with

his concurrence, confirmed and ratified it as his act. On the 22d of May, 1842, execution was taken out and levied on personal property of the judgment debtors. On the 27th of May, 1842, John Mahard, Jr., filed his petition, and was subsequently decreed a bankrupt thereon. The judgment, though confessed in favor of John S. Buckingham alone, was founded on a debt due to both the appellants, who were *bonâ fide* creditors of J. and W. Mahard.

The question is, whether these proceedings came within the second section of the bankrupt act. 5 Stats. at Large, 442. This section provides: "That all future payments, securities, conveyances, or transfers of property, or agreements, made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person any preference or priority over the general creditors of such bankrupt, shall be deemed utterly void, and a fraud upon this act."

By the law of Ohio, a judgment creates a lien on the real estate of the judgment debtor, and the levy of an execution creates one on his personal estate levied on. A power of attorney to confess a judgment, whenever a judgment is taken under it, does in fact operate to create a security upon the debtor's real estate; and when an execution issues on that judgment, to create a lien on the personal estate levied on. It is true these liens arise by operation of law, from the judgment, and execution, and its levy, which are the acts of officers of the law, and not of the debtor. But the power of attorney is designed to, and does, produce those acts which depend upon it for their validity, and therefore through those acts does create the security. The operation of law is always necessary to give effect to any form of security, which indeed is but the legal consequence of the act of the party; and the lien created by a judgment is none the less the legal consequence of the act of the party, because it is necessary that after the power is executed, a judgment should be rendered. When it is rendered, the creditor has a security, by operation of law, through the act of the debtor, and therefore such a security may be correctly said, in the language of this section, to be made or given by the debtor.

If it were not so, one of the acts of bankruptcy, described in the first section of this statute, would make a valid title to the [*166] *creditor. It is an act of bankruptcy, for the debtor willingly to procure his goods or lands to be attached, distrained, sequestered or taken on execution. It cannot be supposed that what was in itself an act of bankruptcy, and done for the purpose of giving a preference over the general creditors, was intended to be left valid, and effectual to defeat one of the two great objects of the law,

which were to grant a discharge to honest debtors who should conform to its provisions, and to distribute their property ratably among all their creditors.

But if a judgment, confessed by the debtor through a power of attorney, be not a security given by him, there is nothing in this act which defeats a preference thus created, and the provisions of this second section become practically inoperative in respect to all property of the debtor which may be bound by a judgment, or even by the levy of an execution; since a speedy and well-known mode of preferring a creditor, by confessing a judgment, is left open to all debtors who may desire to give preferences, even in contemplation of bankruptcy. This consequence, while it would not justify a forced construction of the words used in the act, does certainly require that the utmost meaning and effect, fairly attributable to them, should be laid hold of to prevent so great a mischief.

The language employed in the English bankrupt acts shows, that, under that system, a judgment is treated as a security. The 21 James I. c. 19, § 9, uses the language, "that, if any person have a security for his debt by judgment, statute," &c. The revising act, 6 Geo. IV. c. 16, § 108, provides that "no creditor, having security for his debt, &c., shall receive more than a ratable part of such debt, except in respect to any execution or extent, served and levied by seizure upon, or any mortgage or lien upon, any part of the property of such bankrupt, before the bankruptcy." Thus classing judgments with mortgages, under the word securities. And the Irish bankrupt act, 11 & 12 Geo. III. c. 8, § 5, enacted, that "nothing herein contained shall extend to any security by judgment, obtained before the bankrupt became a trader." Mr. Eden (*Eden on Bankruptcy*, 285,) remarks, concerning the difference in phraseology between the 21 James I. and 6 Geo. IV., that the general term, security, employed by the latter, would necessarily include all the particulars enumerated in the old statute; that is, security necessarily includes judgments. In many of the States, a bond and warrant of attorney to enter up judgment is a usual mode of taking security for a debt, and judgments thus entered are treated as securities, and an equitable jurisdiction exercised over them by courts of law. In some States they operate only as a lien on the lands of the debtor, in others, on his personal estate

* also; *Brown v. Clark*, 4 How. 4; and wherever, by the [*167] local law, a judgment or an execution operates to make a lien on property, we are of opinion it is to be deemed a security; and when rendered upon confession, under a power given by the debtor for that purpose, it is a security made or given by him within the meaning of the bankrupt act, and is void, if accompanied by the

facts made necessary by that act to render securities void. These facts are, that the security was given "in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, a preference or priority over the general creditors of such bankrupt."

The inquiry, whether this security was given in contemplation of bankruptcy, involves the question what is meant by those words. It is understood that, while the bankrupt law was in operation, different interpretations were placed upon them in different circuits. By some judges, they were held to mean contemplation of insolvency—of a simple inability to pay, as debts should become payable—whereby his business would be broken up; this was considered to be a state of bankruptcy, the contemplation of which was sufficient. By other judges, it was held, that the debtor must contemplate an act of bankruptcy, or a voluntary application for the bankrupt law. *In re Pearce*, 6 Law R. 261; *In re Rowell*, 6 Law R. 298; *Jones v. Howland*, 8 Met. 377; *Taylor v. Whitthorn*, 5 Humph. 340.

It is somewhat remarkable that this question should be presented for the first time for the decision of this court after the law has been so long repealed, and nearly all proceedings under it terminated. Perhaps the explanation may be found in the fact, that when securities have been given within two months before the presentation of a petition by or against the debtor, the evidence would usually bring the case within either interpretation of the law. However this may be, it is now presented for decision; and we are of opinion that, to render the security void, the debtor must have contemplated an act of bankruptcy, or an application by himself to be decreed a bankrupt.

Under the common law, conveyances by a debtor, to *bonâ fide* creditors, are valid, though the debtor has become insolvent, and failed, and makes the conveyance for the sole purpose of giving a preference over his other creditors. This common-law right, it was the object of the second section of the act to restrain; but, at the same time, in so guarded a way as not to interfere with transactions consistent with the reasonable accomplishment of the objects of the act. To give to these words, contemplation of bankruptcy, a broad scope, and somewhat loose meaning, would not be in furtherance of the general purpose with which they were introduced.

[*168] *The word bankruptcy occurs many times in this act. It is entitled: "An act to establish a uniform system of bankruptcy." And the word is manifestly used in other parts of the law to describe a particular legal *status*, to be ascertained and declared by a judicial decree. It cannot be easily admitted that this very pre-

cise and definite term is used in this clause to signify something quite different. It is certainly true in point of fact, that, even a merchant may contemplate insolvency and the breaking up of his business, and yet not contemplate bankruptcy. He may confidently believe that his personal character, and the state of his affairs, and the disposition of his creditors, are such, that when they shall have examined into his condition they will extend the times of payment of their debts, and enable him to resume his business. A person, not a merchant, banker, &c., and consequently not liable to be proceeded against and made a bankrupt, though insolvent, may have come to a determination that he will not petition. The contemplation of one of these states, not being in fact the contemplation of the other, to say that both were included in a term which describes only one of them, would be a departure from sound principles of interpretation. Moreover, the provisos in this section tend to show what was the real meaning of this first enacting clause. The object of these provisos was, to protect *bond fide* dealings with the bankrupt, more than two months before the filing of the petition by or against him, provided the other party was ignorant of such an intent, on the part of the bankrupt, as made the security invalid under the first enacting clause. And the language is, "provided that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act." These facts, of one of which a *bond fide* creditor must have notice, to render his security void, if taken more than two months before the filing of the petition, can hardly be supposed to be different from the facts which must exist to render the security void under the first clause; or, in other words, if it be enough for the debtor to contemplate a state of insolvency, it could hardly be required that the creditor should have notice of an act of bankruptcy, or an intention to take the benefit of the act. It would seem that notice to the creditor of what is sufficient to avoid the security, must deprive him of its benefits, and consequently, if he must have notice of something more than insolvency, something more than insolvency is required to render the security invalid; and that we may safely take this description of the facts which a creditor must have notice of to avoid the security, as descriptive, also, of what the bankrupt must contemplate to render it void.

* In construing a similar clause in the English bankrupt [*169] law, there have been conflicting decisions. It has been held that contemplation of a state of insolvency was sufficient. Pulling v. Tucker, 4 B. & Ald. 382; Poland v. Glyn, 2 Dow. & Ry. 310. But both the earlier and later decisions were otherwise, and, in our judgment, they contain the sounder rule. Fidgeon v. Sharpe.

5 Taunt. 545; Hartshorn v. Slodden, 2 Bos. & Pul. 582; Gibbons v. Phillipps, 7 B. & C. 529; Belcher v. Prittie, 10 Bing. 408; Morgan v. Brundrett, 5 Barn. & Ald. 297. And see the opinion of Patteson, J., in the last case.

Considering, then, that it is necessary to show that the debtor contemplated an act of bankruptcy, or a decree adjudging him a bankrupt on his own petition, at what time in this case must he have had this in contemplation? He gave the power of attorney on the 7th of April; the judgment was confessed and entered up on the next day; the execution was taken out and levied, and the lien created thereby, on the 22d of May; and five days afterwards, being less than two months after the execution of the power, the debtor presented the petition under which he was decreed a bankrupt. The only act done by the debtor was the execution and delivery of the power of attorney. It was a security by him made or given, only by reason of that instrument. What followed were acts of the creditor and of officers of the law, with which the debtor is no more connected than with the delivery by a creditor of a deed to the office of the register, to be recorded, or the act of the register in recording it. It would seem that, if the intent of the debtor is to give a legal quality to a transaction, it must be an intent accompanying an act done by himself, and not an intent or purpose arising in his mind afterwards, while third persons are acting; and that, consequently, we must inquire whether the debtor contemplated bankruptcy when he executed the power. It is true, this construction would put it in the power of creditors, by taking a bond and warrant of attorney, while the debtor was solvent and did not contemplate bankruptcy, to enter up a judgment and issue execution, and by a levy acquire a valid lien, down to the very moment when the title of the assignee began. But this was undoubtedly so under the statute of James, which, like ours, contained no provision to meet this mischief; and it became so great that, by the 108th section of the revising act of 6 Geo. IV., it was enacted, that "no creditor, though for a valuable consideration, who shall sue out execution on any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid ratably with such creditors."

If the bankrupt act of 1841 had continued to exist, a similar *170 addition to its provisions would doubtless have become necessary.

It remains to inquire whether the debtor in this case, in point of fact, contemplated bankruptcy, and designed to give a preference to the appellants, when he executed the power on the 7th of April.

It has been stated at the bar that, by some accident, much of the evidence bearing on this question was lost, and is not inserted in the record. We have no doubt of the fact; but this question must be decided here upon what remains; and we think there is sufficient now on the record to show that bankruptcy was in contemplation when the power was given. The petition to be decreed a bankrupt was filed only fifty days after the date of the power. No material change in the state of the debtor's affairs appears to have occurred between the 7th of April and the 27th of May. The only property which came into the hands of the assignee, uncovered by valid liens of particular creditors, was the \$1,300 made by this execution out of property already incumbered by a mortgage to another creditor, for the sum of upwards of \$14,000, dated on the 18th of March preceding, and which has been adjudged by the circuit court to be void, under the second section of the bankrupt act, and no appeal taken.

The bankrupt was a member of a mercantile firm, doing business in Cincinnati and New Orleans, and the commercial paper of this firm, to a very large amount, had been protested for non-payment, and was known to the bankrupt to have been so before this power was given. Holding an execution for \$14,800, the appellants were able to make upon it only \$1,300. Both the mercantile firm and the individual bankrupt were in a state of deep, and so far as appears, irretrievable insolvency, and there is no reason to doubt the bankrupt knew these facts. Though a competent witness for the appellants on the question of his own intent, and able to give decisive evidence, if believed, he has not been examined, nor is there any evidence in the record to control the strong presumption that the purpose he executed on the 22d of May, by filing his petition, existed in his mind fifty days before, when his circumstances were the same, and the inducements to take advantage of the act were as great, as at the time he actually attempted to do so.

It is true the appellants say in their answers they did not know or believe, when the power was given; and do not now believe, the debtor then contemplated bankruptcy. But their answer, though responsive, in this particular, to the bill, is entitled to little weight concerning the state of mind of the debtor, no reasons being given for their belief, and none of the facts explained *from which an opposite inference is to be drawn, 9 Cranch, 160; and their own state of mind is not material, because the petition for the benefit of the bankrupt law was filed within two months after the date of the power.

It has been suggested that the execution of the power of attorney by Mahard was in itself an act of bankruptcy, because he thereby

procured his goods to be taken on execution. But the act requires that this should be done willingly, or fraudulently. The Buckinghams being *bonâ fide* creditors, there is no ground upon which this act can be deemed fraudulent, unless it was done in contemplation of bankruptcy, and with intent to give a preference, and this would bring us back to the inquiry, whether such contemplation and intent existed; and it is explicitly denied by the answers of the Buckinghams that the power was executed by Mahard willingly, it having been done under strong pressure by them, and only at last because a suit was threatened if he did not comply. There is no evidence to control these statements in their answers, so that we cannot say that *per se* the giving of the power was an act of bankruptcy. 1 Deacon's B. L. 446; Thompson v. Freeman, 1 T. R. 155; Hunt v. Mortimer, 10 B. & C. 44; Morgan v. Brundrett, 5 B. & Ad. 297.

We have, therefore, found it necessary to go into the inquiry, whether the bankrupt did in fact contemplate bankruptcy when the power was given, and intend to give a preference thereby; and being of opinion that he did, there is no error in the decree of the circuit court in this particular.

The third objection made to the decree of the court below is, that it established the validity of sundry mortgages on the property of the bankrupts, held by certain banking corporations. It is alleged by the appellants that these mortgages were void, on account of usury; that though, by the statute law of Ohio, a usurious contract is valid, for the principal sum lent, with lawful interest thereon, yet, if a banking corporation make a usurious contract, it is utterly void, because such a banking corporation has no lawful authority to make such a contract, exceeds its powers by attempting to do so, and consequently neither party is bound thereby.

We have not thought it necessary to examine this position, because we are of opinion that usury, in either of these mortgages, is not proved.

The power of these banking corporations to deal in exchange is not controverted. There is no usury on the face of any one of these transactions. It is incumbent on the party who charges usury to prove it; and where it is alleged to consist in taking excessive rates of exchange, or in resorting to the form of a bill of exchange in order to keep out of sight a usurious compensation for the simple [*172] loan of money, these facts must be proved. * Andrews v.

Pond *et al.* 13 Pet. 65; Creed v. The Commercial Bank, 11 Ohio, 489. The answer of each bank denies such intent, and avers that the exchange charged in each case was the customary and regular rate at the time of the discount of each bill. There is not evidence

Hogan v. Ross. 13 H.

to prove the contrary. Indeed, it was agreed by the counsel on both sides, during the argument, that the rates charged were the usual and customary prices of exchange between Cincinnati, where the bills were drawn, and New Orleans, where they were payable, at the times they were discounted. The counsel for the appellants urged that the rates were higher than were charged on sight bills. But these were time bills, and it is no proof of usury that the banks did not take the market rates on sight bills which they did not discount, if they took only the market rates on those they did discount. It was also insisted that the banks did not buy these bills, but were the first takers for loans of money made to the drawers. But we are unable to perceive how the fact that the banks were the first takers can be of any importance in this case, nor do we deem it material that the bills were discounted for the drawers.

The reason why the addition of the current rate of exchange to the legal rate of interest does not constitute usury is, that the former is a just and lawful compensation for receiving payment at a place where the money is expected to be less valuable than at the place where it is advanced and lent. And this reason exists when the lender discounts the drawer's bill as well as when he buys a bill in the market of the payee. In neither case is it usury to take the regular and customary compensation for the loss in value by change of place of payment. It is argued that no usage or custom can make an unlawful contract valid. This must be admitted. But the contract is not unlawful, unless more than six per cent. has been reserved or taken for interest; if more has been reserved or taken, not for the loan and forbearance, but for a change in the place of payment, then the contract is lawful; and in determining whether the excess over six per cent. has been reserved for interest, or as a just compensation for changing the place of payment, the custom, or the market value of this change, is evidence of the real intent of the parties, and so evidence of the validity of the contract.

Our opinion is, that usury was not made out in either of these mortgages, and that there was no error in the decree of the court below declaring their validity. The decree of the circuit court is affirmed with costs. 20 H. 204, 208; 5 Wal. 277.

SMITH HOGAN, ARTHUR S. HOGAN, and REUBEN Y. REYNOLDS, Plaintiffs in Error, v. AARON ROSS, who sues for the Use of ROBERT PATTERSON.

13 H. 173.

Where a set of pleas are all applicable to the first count, which was struck out after the issues thereon were made up, and the second count was not answered, it was regular to give judgment for the plaintiff for want of a plea.

THE case is stated in the opinion of the court.

R. Davis, for the plaintiff.

Coze, contra.

[* 181] *DANIEL, J., delivered the opinion of the court.

This was an action of debt instituted by the defendant in error, who was plaintiff in the court below against the plaintiffs in error, as the obligors in an injunction bond. To the original declaration three pleas were filed at the June term of the court, 1845; to the second and third of these pleas the plaintiff demurred; and at the December term, 1845, the defendants demurred to the plaintiff's declaration. The demurrers to the two pleas above mentioned were sustained by the court, and afterwards, namely, on the 10th December, 1846, the court decided in favor of the demurrer to the declaration; giving, at the same time, leave to amend. The plaintiff, under this leave, filed his amended declaration, presenting the case which was acted upon in the court below. The amended declaration consists of two counts; the first sets out the injunction bond with the condition thereto annexed, and alleges a breach of that condition as the special ground of the action. The second count is for the penalty of the bond, as having been forfeited by failure of payment. The defendants filed five pleas to the amended declaration; upon the first of these pleas an issue of fact was joined, and the four following were by the court adjudged bad upon demurrer. At the December term of the court, 1847, the cause coming on for trial upon

[* 182] the issue joined *upon the first plea, after the testimony on the part of the plaintiff was closed, the defendants tendered a demurrer to the evidence offered by the plaintiff, but in this the plaintiff refused to join, and dismissed or struck out the first count in his declaration; whereupon the defendants moved the court for judgment on the demurrer to evidence, for want of a joinder thereon, but this motion the court refused to grant, and afterward entered up the following judgment: "It appearing to the satisfaction of the court that the defendants have filed no plea to the second count in the plaintiff's declaration, but have therein made default; it is therefore considered by the court that the plaintiff recover of the defendants the sum of \$6,354.10 debt in the second count in the declaration mentioned, and the costs in this cause expended."

If in our examination of the decision of the circuit court, it were deemed necessary to pass upon the legal effect of the pleas tendered by the defendants below, and overruled by the court, we could have

no hesitation in pronouncing each of those pleas bad upon demurrer. It is a settled rule in pleading, that wherever a plea in its commencement professes to respond to the entire declaration or count, and is in substance and reality in answer to part only of such declaration or count, the plea is bad, and the defect may be availed of upon demurrer. If a plea profess in the commencement to answer only part of the declaration or count, and is in truth and substance a response to such part alone, the plaintiff should not demur, because the residue of the count or declaration is unanswered, but should take judgment for that residue by *nil dicit*, as by demurring he would operate a discontinuance of the entire cause. The authorities upon these canons of pleading will be found collected from the earliest decisions by Sergeant Williams, in note 3 to the case of *The Earl of Manchester v. Vale*, 1 Saund. 28. The same rules are expressly affirmed in *Tippet v. May*, 1 Bosanquet & Puller, 411; *Everard v. Patterson*, 6 Taunt. 625; *Wilcox v. Newman*, 1 Chitty's Rep. 132, and *Hallet v. Holmes*, 18 Johns. 28. In the case before us, every plea tendered by the defendants embraces within its commencement the entire cause of action, averring that the plaintiff should not have or maintain his action; yet each of them in its body and substance, is limited to the condition of the injunction bond and to some stipulation in that condition to which each plea specifically refers. The pleas demurred to, therefore, could not but be properly overruled; and with respect to that upon which issue was joined, it being immaterial and inconclusive as to the entire declaration, and defective in the same sense with the others, had the issue been found against the plaintiff, he would still *have been entitled to judgment *non obstante veredicto*. [*183] But upon this record there remains no subject for the application of the rules of pleading above adverted to. The first count in the declaration having been dismissed or stricken out, every thing which was pertinent strictly to that count, or which constituted a defence to the case made thereby, falls with the count against which such defence was interposed. The case then remains solely on the second count in the declaration, and it cannot be pretended that to this count, consisting purely of a money claim, connected with no condition, any pleas have been interposed upon this record to this count; therefore the case must be considered as one of plain default entirely unanswered by the defendant below, and as having been properly so treated by the circuit court. The judgment of the circuit court is, therefore, affirmed.

Coffee v. The Planters Bank of Tennessee. 13 H.

THOMAS J. COFFEE, Plaintiff in Error, v. THE PLANTERS BANK OF TENNESSEE.

13 H. 183.

As, by the law of Mississippi, a joint promise on negotiable paper, makes a several, as well as a joint liability to action, the plaintiff, in an action against two or more jointly, may, by leave of the court, discontinue against all but one, and take judgment against him alone, though the defendants plead jointly.

And where such a judgment was rendered on a count for money had and received, and no objection was taken in the court below, upon a writ of error it was intended, in support of the judgment, that the liability of the defendant arose out of negotiable paper, and so was several as well as joint.

ERROR to the circuit court of the United States for the southern district of Mississippi. The case is stated in the opinion of the court.

Coxe, for the plaintiff.

Badger, contra.

[* 186] * DANIEL, J., delivered the opinion of the court.

The questions of law to be decided in this cause, arise upon the following facts: The defendant in error, (the plaintiff in the court below,) described in the pleadings to be a corporation created by the laws of the State of Tennessee, the stockholders of which are citizens of Tennessee, declared in *assumpsit*, in the court below against the Mississippi and Alabama Railroad Company, averred to be a corporation created by the laws of Mississippi, and also against William H. Shelton, Robert G. Crozier, Henry K. Moss, Samuel M. Puckett, Thomas G. Coffee, (the plaintiff in error,) and William H. Washington, averring the said individuals to be all citizens of the State of Mississippi. The declaration contained twenty-four counts; twenty-three of which set out respectively checks drawn by the Mississippi and Alabama Railroad Company, for different sums of money, payable to some of the individual defendants in the court below, and indorsed by the payee and successively by the other defendants, so as at last to become payable to the plaintiff below, the defendant in error as the last indorsee.

The last or twenty-fourth count in the declaration, was upon an *indebitatus assumpsit*, for \$150,000, for money lent and advanced, for the like sum for money laid out and expended, and for the like sum for money had and received, laying the damages at \$300,000.

The defendants below, Moss, Puckett, Shelton, and Coffee the plaintiff in error, appeared to the suit and pleaded jointly the general

issue. Crozier also appeared and pleaded *non assumpsit*. The Mississippi and Alabama Railroad Company did not appear. Afterwards, upon a suggestion of the death of Washington and Shelton, the suit was abated as to these parties, and upon the motion of the plaintiff below, the defendant in error, * the suit was [* 187] ordered to be discontinued as to all the defendants below except the plaintiff in error; and a jury being impanelled upon the issue joined as to him, found a verdict against him in damages for the sum of \$149,924.97, for which sum, together with costs of suit, a judgment was entered by the circuit court. No exception appears to have been taken to the forms of proceeding, nor to any ruling by the court upon the trial, and the questions for consideration here are raised upon facts as above set forth.

On behalf of the plaintiff in error it is insisted, that upon none of the twenty-three counts, each of which sets forth a deduction of title by intermediate indorsements from the payees, can this action be maintained, because it appears, on the face of those counts, that the drafts or checks constituting the claim were drawn by a corporation situated within the State of Mississippi, and the members of which corporation were citizens and inhabitants of that State, in favor of payees who being also citizens of that State, could not sue upon those drafts in the courts of the United States, and could not, by indorsement, confer upon others a right denied by the law to themselves.

By the 11th section¹ of the act of congress establishing the judicial courts of the United States, it is declared, that no district or circuit court of the United States shall have cognizance of any suit to recover the contents of any promissory note or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. This provision has been expounded by this court as early as 1799 in the case of *Turner's Administrator v. The Bank of North America*, 4 Dall. 8. It has received a further interpretation in the case of *Montalet v. Murray*, 4 Cranch, 46; of *Young v. Bryan*, 6 Wheat. 146; of *Molan v. Torrance*, 9 Wheat. 537; and of *Evans v. Gee*, 11 Pet. 80. These several decisions have settled the construction of the 11th section of the judiciary act, and the principle they have affirmed is unquestionably fatal to a right of recovery under the first twenty-three counts, for they deny jurisdiction in the courts of the United States over cases of intermediate deduction of title from the payee, where such payee and the maker of the instrument are citizens of the same

¹ 1 Stats. at Large, 78.

State, with the exception of foreign bills of exchange; and in the case before us every special count is framed upon a title thus deduced; and is not within the exception made by the statute. But whilst the authorities cited have laid down the above doctrine with reference to intermediate deductions of title from the payee of a note or check, they have ruled with equal clearness that as be-
[* 188] tween the * immediate indorsee and indorser, being citizens and inhabitants of different States, the jurisdiction of the federal courts attaches, as upon a distinct contract between these parties, independently of the residence of the original and remote parties to the instrument. Upon the doctrine thus ruled, the following question recurs for our decision upon this record, namely, whether the plaintiff below, the defendant in error, as a corporation created by and situated within the State of Tennessee, and the members of which corporation were citizens of that State, as immediate indorsee of the plaintiff in error, a citizen and inhabitant of the State of Mississippi, had the right to a recovery against him, as the immediate indorser of the notes or checks on which the action was founded. As to the general principle relative to the jurisdiction of the federal courts, and as to the right of recovery or of action as between the immediate indorsee and indorser, we have already stated that principle as having been conclusively settled; if, then, there can be an objection to its application or controlling effect in the case before us, it must exist as to the manner of that application in the proceedings in this cause, and not to the rule itself. Such objection, it has been attempted, on the part of the plaintiff in error, to maintain. Thus it is disclosed upon the record, that after the general issue pleaded by all the defendants except the Mississippi and Alabama Railroad, who were in default, the action was by order of the circuit court, on the motion of the plaintiff, discontinued as to all the defendants except the now plaintiff in error, the last indorser, and as to him also, upon all the counts except the general *indebitatus assumpsit*, upon which the case was tried and verdict and judgment obtained. It has been insisted, that the proceeding just mentioned, under the order of the circuit court, was erroneous; that the liability of the defendants was a joint liability, as set forth in the declaration, and could not be severed upon motion, and that the discontinuance as to one of the defendants was a discontinuance as to them all. It may here be remarked, in the first place, that however the liability of the defendants below may have been presented by the declaration, it is certain that the responsibility of the indorser to his immediate indorsee, is strictly a several responsibility, and that so far as the jurisdiction of the federal court is concerned, there is no right in the

indorsee to look beyond that responsibility into transactions between citizens of the same State. The courts of the United States, therefore, could not, upon the face of the pleadings, take cognizance of questions beyond the several responsibility arising out of the transaction between the indorsee and his immediate indorser. We deem it unnecessary, however, to examine critically, in connection with *the proceedings had in this cause, the doctrine of [* 189] joint and several obligations as settled by the common law and the rules of pleading founded thereon, and are the less disposed to listen to objections drawn from that source at this stage of the case, as not an exception has been taken upon the record to any of the proceedings in the circuit court, which are, therefore, entitled to every presumption in their favor, whether of fact or law, which is not excluded by absolute authority. But the proceedings in this case should not be tested by the rules of the common law in relation to joint and several obligations; but should be judged of by the regulations of a local polity which has been adopted by the courts of the United States, and in conformity with which the pleadings in this case have been controlled and modelled.

By the statute of Mississippi, *vide* Howard and Hutchinson's edition, c. 44, p. 578, § 9, it is declared that: "Every joint bond, covenant, bill, or promissory note; shall be deemed and construed to have the same effect in law as a joint and several bond, covenant, bill, or promissory note, and it shall be lawful to sue out process and proceed to judgment against any one of the obligors, covenantors, or drawers of such bond, covenant, bill, or promissory note, in the same manner as if the same were joint and several." In the same collection, c. 45, p. 594, § 28, it is laid down, that "it shall hereafter be lawful for the holder or holders of any covenant, bond, bill, or promissory note, signed by two or more persons, to sue any number of the covenantors, obligors, or drawers thereof in one and the same action."

By these statutory provisions the rules prescribed under the common law with respect to suits upon joint and several promises have been essentially changed, and the same license which concedes to a party the power of instituting his suit against one or more, or all the parties to an undertaking, carries with it by necessary implication the right to prosecute or discontinue it in the same sense and to the same extent and degree. In accordance with this conclusion is the interpretation given to the statutes of Mississippi by the supreme court of that State, as will be seen in the cases of *Peyton and Halliday v. Scott*, 2 How. (Miss.) Rep. 870; *Lynch et al. v. Commissioners of The Sinking Fund*, 4 *ibid.* 377; *Dennison v. Lewis*, 6 *ibid.* 517; *Prewet v. Caruthers et al.* 7 *ibid.* 304; and that interpretation by the

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state court, of these statutes, has been repeatedly sanctioned as a rule of proceeding in the circuit court of the United States for the district of Mississippi, by the decisions of this court, as will be seen by the cases of *M'Afee v. Doremus*, 5 How. 53; of *The Bank of The United States v. Moss et al.* 6 How. 31; and of *The United States v. Girault et al.* 11 * How. 22. It follows, then, from the foregoing authorities, as an inevitable conclusion, that whether the undertakings set out in the special counts or in the general *indebitatus assumpsit* be taken as joint or as joint and several, it would have constituted no valid objection to the proceedings in the circuit court by which the cause was discontinued, as to all the defendants save the last or immediate indorser, even had such an objection been directly and expressly presented and reserved by the pleadings. That discontinuance deprived him of no right, imposed upon him no burden or responsibility he was not already bound to sustain—it merely left him in the exact position in which his undertaking with the plaintiff below could be regularly and properly adjudicated. Upon full consideration, therefore, we think that the judgment of the circuit court should be, and the same is hereby affirmed.

ALEXANDER H. WEEMS, Plaintiff in Error, v. ANN GEORGE, CONELLY GEORGE, ROSE ANN GEORGE, Wife of JOHN STEEN, MARY ANN GEORGE, Wife of THOMAS CONN, NANCY GEORGE, Wife of JAMES GILMOUR, MARGARET GEORGE, Wife of WILLIAM MILLER, JOHN STEEN, THOMAS CONN, JAMES GILMOUR, and WILLIAM MILLER.

13 H. 190.

When a case comes here by a writ of error to the circuit court in Louisiana, and it appears that the whole case, both upon the law and the fact, was submitted to the judge without a jury, the admission or rejection of evidence merely, though excepted to, cannot be assigned for error.

THE case is stated in the opinion of the court.

Miles Taylor, for the plaintiff.

Lawrence, contra.

[* 195] GRIER, J., delivered the opinion of the court.

The defendants in error brought this suit in the circuit court of the United States for the eastern district of Louisiana, against Weems, the plaintiff in error, by petition, according to the practice in the courts of that State. They aver, in their petition, that they are aliens, and subjects of the queen of Great Britain, with

the exception of two, who were citizens of the State of Illinois; and that they are the heirs of Alexander George, deceased. That said George, in his lifetime, was owner of a certain island, the undivided moiety of which he had sold to Weems. That, in the act of partition between them, Weems agreed to pay two certain notes, given by George for the purchase-money, and which were secured by mortgage on the land,—one for \$1,305.82, payable on the 1st of January, 1848, and the other for \$1,250.22, on 1st of January, 1849. That Weems paid the sum of \$600 on the notes, but neglected or refused to pay the balance. That Alexander George having died, and the defendants in error having been admitted to the succession as * his heirs, an execution was issued on the mortgage for [* 196] the balance of the notes, on which certain slaves held by them, as such heirs, were seized and sold; and the sum of \$2,435.88 raised in satisfaction of the balance of said notes, with interest and costs of suit.

The defendant below filed two pleas to the jurisdiction: 1. That the plaintiffs were not aliens, as set forth in their bill; and, secondly, that the claim of the plaintiffs is under Alexander George, who was a citizen of Louisiana.

These pleas were overruled,—the first, it is to be presumed, because it was not true in fact; and the second, because it was not good in law. For the plaintiffs' petition does not set forth a claim as assignees of the negotiable paper or notes mentioned therein, but for damage and loss incurred by them, from the neglect and refusal of Weems to pay certain liens which he had contracted to pay in the act of partition between himself and George.

As the argument submitted by the counsel for plaintiff in error does not insist that there was error in overruling these pleas to the jurisdiction, they need not be further noticed.

The case was afterwards heard on the merits before the court, without the intervention of a jury; and a paper, called a bill of exceptions to the admission of certain testimony, is found on the record, on which the plaintiff in error seems mainly to rely for the reversal of judgment. It might be thought, perhaps, hypercritical to object to the form of this paper, as it comes from a State where common-law forms are little known in practice; but it may be remarked, that this document certifies only that certain testimony was offered and received by the court after objection by the defendant's counsel, and does not state that any exception was taken to such ruling of the court, or that the judge who signed it was asked to seal, or did seal a bill of exceptions. But, waiving this objection, the first exception is to receiving in evidence a certain paper, marked

D. That paper is not copied in, or annexed to, the bill. It is said to be a certificate from the clerk of the eighth judicial district for the parish of St. Tammany, offered to prove that certain claims against the succession of Alexander George were paid by his heirs. The objection to it was undoubtedly a good and valid objection, if the contents of the paper were what the objection assumes them to be. But as the paper itself is not set forth in the bill, this court cannot know whether the objection was overruled because the paper was not what it was assumed to be, or because the objection was not well taken, if it was.

The second exception was to the admission of parol testimony, that a suit had been brought against the defendant, Weems. [* 197] * The objection, that the contents of a record cannot be proved by parol, is certainly a good and legal one, if such were the offer or such the evidence given by the witness.

But the bill does not state any of the preceding evidence in the case, nor the purpose or bearing of the testimony offered. It may have been merely offered to show demand of the payment of a note; a fact *in pais*, which may be proved in parol, like any other mode of demand, notwithstanding it was made by presenting a writ.

But there remains an objection to these bills of exception which is conclusive against them, even if they had been drawn in all proper and legal form. It has been frequently decided by this court that, notwithstanding there is no distinction between suits at law and equity in the courts of Louisiana, in those of the United States this distinction must be preserved. When the case is submitted to the judge, to find the facts without the intervention of a jury, he acts as a referee, by consent of the parties, and no bill of exceptions will lie to his reception or rejection of testimony, nor to his judgment on the law. In such cases, when a party feels aggrieved by the decision of the court, a case should be made up, stating the facts as found by the court, in the nature of a special verdict, and the judgment of the court thereon. If testimony has been received after objection, or overruled, as incompetent or irrelevant, it should be stated, so that this court may judge whether it was competent, relevant, or material, in a just decision of the case. See *Craig v. Missouri*, 4 Pet. 427.

In *Field v. The United States*, 9 Pet. 202, Marshall, C. J., in delivering the opinion of the court, says: "As the case was not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But if the district court improperly admitted the evidence, the only effect would be, that this court would reject that evidence, and proceed to decide the cause as if it were not on the record. It would not, however, of itself, con-

 Lord v. Goddard. 13 H.

stitute any ground for the reversal of the judgment." And, again, in *The United States v. King*, 7 How. 853, 854, it is decided, that "no exception can be taken where there is no jury, and where the question of law is decided in delivering the final decision of the court." And, "when the court decides the fact without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions."

It is alleged, also, that there is error on the face of this record, because the court allowed the whole amount levied from the property of the plaintiffs below, being the amount of the notes and *costs; because, by art. 1929 of the code of Louisiana, [* 198] "the damages due for delay in the performance of an obligation are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more." But we are of opinion that this objection is founded on a mistake of the nature of the action, which is not brought on the notes mentioned in the petition, but for damages suffered by the plaintiffs below, on account of the non-performance by the defendant of his stipulations contained in his act of partition. This case, therefore, comes within the art. 1924 of the code, which says: "The obligations of contracts extending to whatsoever is incident to such contracts, the party who violates them is liable, as one of the incidents of his obligations, to the payment of the damages which the other party has sustained by his default."

The judgment of the circuit court is affirmed, with costs.

1 Wal. 99.

**SAMPSON B. LORD and GEORGE W. JENNESS, Plaintiffs in Error, v.
JOHN GODDARD.**

13 H. 198.

The gist of an action for a false representation concerning the credit of another, is the fraud of the defendant, and damage thereby done to the plaintiff; and for any honest statement, however ill-founded, this action will not lie.

THE case is stated in the opinion of the court.

Norris, for the plaintiff.

Washburn, contra.

* CATRON, J., delivered the opinion of the court. [* 209]

Goddard sued Lord and Jenness in the circuit court of New Hampshire, alleging that the defendants, by letter, recommended West and Daby as men well worthy of credit, and good for what

they wished to purchase; that they were dealers in coal, lumber, lime, &c., and that West, one of the firm, was visiting Bangor, Maine, for the purpose of purchasing lumber for the New York market.

[*210] *The letter set forth in the declaration, was dated at Portsmouth, New Hampshire, and directed to Goddard, at Bangor, Maine. West and Daby resided in New York.

On the faith of this letter, Goddard credited West and Daby for a cargo of lumber worth nearly two thousand dollars, giving them four months' time; for which lumber West and Daby never paid, having been insolvent when the letter of recommendation was given, and so continued afterwards. It is clear that they were mere insolvent adventurers, without property, and entitled to no credit or confidence.

The declaration alleges that the letter was given by Lord and Jenness with an intention to deceive and defraud Goddard; and that they did procure credit for West and Daby falsely and fraudulently. On the plea of the general issue, the parties went to trial, when it appeared that Lord had a son residing in New York, who, on the 28th of October, 1847, gave a letter of introduction to West, dated at New York, and directed to Lord, the father, at Portsmouth, N. H. The letter recommended the firm of West and Daby, as fully worthy of credit, and requested that Lord, the defendant, should recommend West and Daby to others. West delivered this letter, and on the same day got the one on which the suit is founded. It was written by the wife of the younger Lord, who was in Portsmouth, at the instance of West; he being known to her, but not known to Lord or Jenness, the defendants. They seem to have acted on the information contained in the younger Lord's letter, and on the representations of his wife.

On this state of facts, the court charged the jury: 1. That, as a general rule, it must be proved that the representations made were false; and that the defendants made them, knowing they were false, and intended to defraud the plaintiff; and if the defendants made the representations, believing them to be true, they were not liable. "But a party, if stating positively that a person is entitled to credit, should do it from his own knowledge, or from full and proper inquiries; and then he is not liable if the debtor is insolvent, unless the jury see circumstances in the case of real fraud. But, if a party states this positively as to the credit of an individual, and does it ignorantly, not knowing the credit of the person recommended, and without making full and proper inquiries, and the statements turn out to be false, the jury may infer that those, so recommending, did wrong, and deceived, because they must know that third persons are

likely to rely on their stating what they personally know, or had duly inquired about, or what they had good reason to suppose their information as to it was sufficient and true. If the defendants in this case did not make the recommendation upon *such [* 211] authority or information as you may think under the instructions they ought to have acted upon, you will charge them."

The jury found for the plaintiff on this charge, and the only question is, whether it was proper.

The gist of the action is fraud in the defendants, and damage to the plaintiff. Fraud means an intention to deceive. If there was no such intention, if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue. Since the decision in *Haycraft v. Creasy*, 2 East, 92, made in 1801, the question has been settled to this effect in England.

The supreme court of New York held likewise in *Young v. Covell*, 8 Johns. 23.

That court declared it to be well settled that this action could not be sustained, without proving actual fraud in the defendant, or an intention to deceive the plaintiff by false representations. The simple fact of making representations, which turn out not to be true, unconnected with a fraudulent design, is not sufficient.

This decision was made forty years ago, and stands uncontradicted, so far as we know, in the American courts.

Taking the foregoing instruction together, we understand it to mean this: That, if the jury believed due inquiry as to the credit of West and Daby had not been made by Lord and Jenness, and that they had signed the letter ignorantly, and regardless of the fact whether the persons recommended were or were not entitled to credit, then the jury should charge the defendants. The real test of conduct, according to the charge, obviously being, whether Lord and Jenness ought to have accorded confidence to the younger Lord's letter, and to its sanction by his wife; and whether this information was of such a character as to justify them in writing the letter to Goddard, without further inquiry.

That this instruction, taken in its proper sense, was evasive of the true rule, and calculated to mislead the jury, is manifest, and therefore the judgment must be reversed, and the cause sent down for another trial.

JAMES S. MORSELL. Special Bail of WILLIAM SMITH, Plaintiff in Error, v. HENRY A. HALL.

13 H. 212.

The omission of the defendant to join in a demurrer to a plea, is a waiver of that plea. The judgment against the debtor is conclusive evidence of the existence and amount of the debt in a *scire facias* against the bail.

An omission to enter a formal judgment on one of two pleas, which was demurred to, and which showed no defence, is cured by the statute of jeofails. (1 Stats. at Large, 91, § 32.)

▲ motion to enter an *exoneretur* is not a defence to the *scire facias*, but an appeal to the discretion of the court for a summary exercise of its equitable power; and the refusal of the motion cannot be assigned for error.

THE case is stated in the opinion of the court.

Stewart and Johnson, for the plaintiff.

Dulany, contra.

[* 214] *TANEY, C. J., delivered the opinion of the court.

This is a *scire facias* brought by Hall against Morsell, as the special bail of William Smith, in a suit in the circuit court of the United States for the district of Maryland, in which Hall recovered a judgment, and proceeded by proper process to charge the bail.

Morsell appeared to the *scire facias*, and pleaded: 1. *Nul tiel record*; and, 2. That the promissory note, filed as the cause of bail in the action against Smith, was paid before the judgment was obtained against Smith. The plaintiff, in the court below,

[* 215] took issue on the first plea, and demurred to the second; *but the defendant did not join in the demurrer. The court gave judgment for the plaintiff, upon which this writ of error is brought.

The plaintiff in error alleges that, according to the record, the case was decided on the first plea only, and that the demurrer was not disposed of by the judgment; and they assign as error: 1. That no judgment was given on the second plea; and 2. If the court consider it to be overruled by the general judgment for the plaintiff below, that then the judgment is erroneous, because the plea was a good defence.

As relates to the first objection, the refusal or omission of the plaintiff in error to join in demurrer was a waiver of the plea, and there was no issue in law upon the second plea upon which the circuit court was required to give judgment. *Townsend v. Jemison*, 7 How. 719, 720.

And as concerns the second objection, if the plea was before the

court and not waived, it was no defence. For the right of the defendant in error being established by the judgment in his favor, he was not bound to prove it over again in the *scire facias* against the bail. 1 Chit. Pl. (Am. ed. of 1847) 469, 486, and margin.

And, consequently, the omission to enter a formal judgment upon it could not, under the act of congress of 1789, c. 20, § 32, be assigned as error. The omission would be a mere imperfection in form, not affecting the right of the cause or the matter in law as they appear on the record. *Roach v. Hulings*, 16 Pet. 319; *Stockton and others v. Bishop*, 4 How. 164; and *Parks v. Turner and Renshaw*, 12 How. 39, decided at the present term.

The record, as transmitted to this court, shows that a motion was made before the judgment on the *scire facias* to enter an *exoneretur* of the bail upon ground similar to that taken in the second plea; and that affidavits were filed in support of, and also in opposition to the motion. And it has been urged, in the argument here, that the circuit court erred in not granting this motion.

A motion to enter an *exoneretur* of the bail is no defence to a *scire facias* even if sufficient grounds were shown to support the motion, (which we do not mean to say was the case in the present instance.) It is a collateral proceeding, not forming a legal defence to the *scire facias*, but addressing itself to the equitable discretion of the court, and founded upon its rules and practice. Chit. Pl. (Am. ed. 1847) 469. No writ of error will therefore lie upon the decision of a motion of that kind; because a writ of error can bring up nothing but questions of law. It does not bring up questions of equity arising out of the rules and practice of the courts. And the proceedings upon the motion to *discharge the bail, form no part [* 216] of the legal record in the proceedings on the *scire facias*, and ought not to have been inserted in the record transmitted to this court.

There is no foundation, therefore, for any of the errors assigned in this case, and the judgment of the circuit court must be affirmed, with costs.

THE UNITED STATES, Appellants, v. WILLIAM and ALEXANDER McCULLAGH and JAMES CORNAHAN, Trustees of the Heirs of ALEXANDER McCULLAGH and DAVID McCALB.

13 H. 216.

The petition of the appellees, founded on a British grant, dismissed, because, if any title was made thereby, it was a complete legal title, and the district court had not jurisdiction under the act of May 26, 1824, (4 Stats. at Large, 52,) as revived by the act of June 17, 1844, (5 Stats. at Large, 676.)

THE case is stated in the opinion of the court.

Lawrence and Crittenden, (attorney-general,) for the appellants.

Janin and Taylor, contra.

TANEY, C. J., delivered the opinion of the court.

This case arises on a petition filed by the appellees in the district court for the eastern district of Louisiana, praying that their title to a certain tract of land containing one thousand acres, situated on the Mississippi River, to the westward of Baton Rouge, may be declared valid and confirmed. They claim title under Alexander McCullagh,

Sen., who obtained a grant from the British authorities [* 217] while they were in possession of the country * and before it was ceded to Spain. The grant was made on certain conditions therein specified, which it is not necessary to state, as the court is of opinion that the district court had no jurisdiction in the questions upon which the validity or invalidity of the title claimed by the appellees against the United States, depends.

The proceeding is under the act of June 17, 1844, and this court have always held that under that act the district court has jurisdiction in those cases only where the title set up by the petitioner is equitable and inchoate; and where there is no grant purporting to convey a legal title as contradistinguished from an equitable one. It is true that the cases heretofore decided have arisen under titles derived from the French or Spanish authorities while they respectively held the territory and exercised dominion over it. And this is the first case that has come before the court in which the title sought to be confirmed is derived from the government of Great Britain. But as respects the jurisdiction of the district court, claims of this description are placed by the act of 1844, on the same footing with those which are derived from France or Spain. The jurisdiction conferred in either case is that of a court of equity only; and the titles which the court is authorized to confirm, are inchoate and imperfect ones, which, upon principles of equity, the government of the United States are bound to confirm and make perfect.

In this case, all of the questions upon which the title of the appellees depend, are strictly legal questions, to be decided in a court of law, in a suit at law. They are not, therefore, within the equity jurisdiction given by the acts of 1824 and 1844. There are no equitable considerations involved in the controversy; and the validity or invalidity of this claim, can be tried and determined in any court having competent jurisdiction to try and decide a disputed title to

Miller v. Austen. 13 H.

land between individual claimants. There was no necessity, therefore, for any special jurisdiction to try them, and on that account they were not embraced in the acts of congress above mentioned.

It appears, in this case, that the district judge had an interest in the land in question, and the cause was certified to the circuit court for the eastern district of Louisiana, under the act of March 3, 1821,¹ and the decree affirming this title was passed by the circuit court. This decree must be reversed; and a mandate issued to the circuit court to dismiss the petition without prejudice to the rights of the United States or the appellees.

HENRY MILLER, Plaintiff in Error, v. DAVID AUSTEN, WILLIAM S. WILMERDING, and DAVID AUSTEN, JR., Defendants.

13 H. 218.

The following paper:—

"No. 959.

Mississippi Union Bank, Jackson, (Miss.,) February 8, 1840.

I hereby certify that Hugh Short has deposited in this bank, payable twelve months from 1st May, 1839, with five per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order, upon the return of this certificate. \$1,500. Wm. P. Grayson, Cashier,"—not being paid at maturity and due demand made and notice to an indorser having been given, *held* that it was negotiable and the indorser liable.

ERROR to the circuit court of the United States for the district of Ohio.

Fox, for the plaintiff.

Chase and Rockwell, contra.

* CATRON, J., delivered the opinion of the court. [* 228]

The only question this case presents that we deem worthy of notice is, whether the paper sued on is a negotiable instrument; it is as follows:—

"No. 959. Mississippi Union Bank, Jackson, (Miss.) Feb. 8, 1840. I hereby certify that Hugh Short has deposited in this bank, payable twelve months from 1st May, 1839, with 5 per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order upon the return of this certificate. \$1,500 Wm. P. Grayson, Cashier."

The suit was by the last indorsee against his immediate indorser, and brought in Ohio. The statute of that State declares all promis-

¹ 3 Stats. at Large, 643.

sory notes, drawn for a sum certain, payable to any person or order, or to any person or his assigns, negotiable by indorsement.

The established doctrine is, that a promise to deliver, or to be accountable for, so much money, is a good bill or note. Here the sum is certain, and the promise direct. Every reason exists [* 229] * why the indorser of this paper should be held responsible to his indorsee, that can prevail in cases where the paper indorsed is in the ordinary form of a promissory note; and as such note, the state courts generally, have treated certificates of deposit payable to order; and the principles adopted by the state courts in coming to this conclusion, are fully sustained by the writers of treatises on bills and notes. Being of opinion that the circuit court properly held the paper indorsed, negotiable, it is ordered that the judgment be affirmed.

19 H. 393.

ALANSON SALTMARSH, Plaintiff in Error, v. JAMES W. TUTHILL.

13 H. 229.

A party to a bill is incompetent to prove any fact which, taken in connection with other facts, cuts off a part of the nominal amount of such bill.

ERROR to the district court of the United States for the middle district of Alabama.

J. A. Campbell and Seward, for the plaintiff.

Pryor, contra.

CATRON, J., delivered the opinion of the court.

Hill drew a thirty days' bill, dated at Mobile, on William Bower and Co., for four thousand dollars, payable to Coleman. It was indorsed by Coleman to Saltmarsh, and by him to James W. Tuthill, who sued Saltmarsh. The parties went to trial on the general issue, and the defence relied on was usury. By the laws [* 230] * of Alabama, a party to any security for the payment of money, who takes more than after the rate of eight per cent. per annum for the money advanced, is prohibited from recovering any interest, and can have judgment only for the original sum loaned. And this abatement was the matter in controversy. To prove the usury, Hill, the drawer, and William Bower, one of the drawees, were introduced on behalf of the defendant; and objected to by the plaintiff as incompetent, on the ground that a party to negotiable paper who, by the sanction of his name, gave it credit and currency, could not afterwards, upon his own testimony, invalidate

the instrument, by showing that the consideration on which it was executed was illegal. The witnesses were rejected.

Both Hill and Bower were offered to prove facts which, when taken in connection with additional facts, that might be proved by others, would invalidate the instrument in part, by abating the interest. The proof was offered, and only material to establish the defence of usury, this being the sole defence. It must be admitted, that if the party to the bill had been introduced to establish the whole defence, then he was incompetent; and to hold, that he could prove a defence in part, without which piece of evidence no successful defence could be made, would be a mere evasion of the rule, which excludes such witness from giving evidence to impeach the consideration.

No other question is presented to us, nor does any other exist in the record, worthy of notice. It is therefore ordered, that the judgment of the circuit court be affirmed.

1 Wal. 166.

CYRIL C. TYLER, and his Wife, SARAH P. TYLER, Appellants, v.
GEORGE N. BLACK.

13 H. 230.

A conveyance of land set aside, for fraudulent misrepresentations as to the quantity, value, and title.

THE case is stated in the opinion of the court.

Fessenden, for the appellants.

Rowe, contra.

* WAYNE, J., delivered the opinion of the court.] * 236]

This is an appeal from the circuit court of the United States for the district of Maine, sitting as a court of equity.

The complainants, Tyler and wife, filed their bill, to set aside a sale of land made by them to Black, upon the ground of fraud, concealment, and fraudulent representations made to them by

* Black; and also upon the ground of inadequacy of price [* 237] as furnishing evidence of fraud.

Towards the latter end of the last century, the State of Massachusetts established a lottery for the sale of some lands in Maine; and one Zenos Parsons drew a prize of 1920 acres, being lot number one, in township No. 33.

On the 25th of March, 1799, Parsons conveyed to Aaron Putnam,

of Charlestown, Massachusetts, for the consideration of six hundred dollars, twelve hundred and twelve acres of the said land, being an undivided interest. Putnam had three children, two sons and a daughter. The daughter married Tyler, and they were the complainants and appellants in the present cause. One of the sons died without issue, and the other son left two children, namely, Edward and Elizabeth, who married Soule, who resided in Fairfield, Vermont.

At the time of the death of Aaron Putnam, his daughter was a minor, and resided in Massachusetts. When the transaction occurred which gave rise to the present suit, she was residing with her husband, Tyler, at Hopkinton, in New Hampshire. Black resided near the land in Maine, and had acted as the agent of the owner of the remaining undivided interest for upwards of twenty years.

In November, 1846, Black went to Fairfield in Vermont, and offered to purchase the share of Edward and Elizabeth, who were ignorant of their title to the land; but they refused to sell. Black there learned that Tyler and his wife were the owners of one half of the 1212 acres which had been conveyed by Parsons to Putnam, and immediately proceeded to Hopkinton to see them. At this time Black's position was this: he resided at the town of Ellsworth, which communicated, by a navigable stream, with the land in question; he had been connected, since 1833, with his father, John Black, in the business of agency for the proprietors of nearly all the lots in the townships in which the land in question was situated; and in the seasons of 1844-5 and 1845-6 there had been lumbering operations upon lands in the neighborhood.

The interview between Black and Tyler is thus described by Joseph Stanwood in his deposition.

Second. To the second interrogatory he saith: "I was present at the public house when Mr. Black came here and took the deed, as before stated; my father-in-law and I were then keeping a public house; Mr. Black came in and inquired for Doctor Tyler; what sort of a man was he, and what were his circumstances as to property; I told him he was a physician, doing a tolerable good share of business; had his house and other buildings clear of debt, as I [* 238] supposed." * Third. To the third interrogatory he saith:

"I was not present at the commencement of the interview betwixt Tyler and Black. I left the room soon after Tyler came in; after they had been together perhaps an hour, Tyler came out and told, in substance, that Black and he had been talking about some land in Maine. I went into the room with them; Black said there was a tract of land in Maine, and he could find no person that had any claim to it, unless it belonged to the heirs of Doctor Put-

nam; Black said he would give Tyler fifty dollars for a deed of the land from Tyler and his wife; or, if they would give him fifty dollars, he would tell them all he knew about the land; they came to no agreement at that time, but separated late at night; the next morning Black said he had concluded to make Tyler another offer for the land; he would give him one hundred dollars for a deed; I went to Doctor Tyler, told what Black had offered, and he came in and concluded to take it."

Fourth. To the fourth interrogatory he saith: "The inquiries in the first part of this interrogatory were not made, if made at all, in my presence, but I inferred from their conversation that these questions had been settled before I came into the room. Black represented that the land was situated in a township, and gave the number of the township, but refused to name the county; when the deed was made, he directed me to insert a different number from that he had represented in the previous conversation; he either represented that the township in which the land was situated was thirty-one, and directed me to insert thirty-three in the deed, or represented thirty-three as the number of the township, and had thirty-one inserted in the deed, but which I cannot now recollect."

Fifth. To the fifth interrogatory he saith: "That Black said the land was holden, if held at all, by virtue of a lottery ticket, the form of which he attempted to describe; it was made of pasteboard or thick paper, as I understood; he said he had lately seen one in the hands of a Mr. Webster, I think, but I am not certain about the name. Black said he had made many inquiries about the title to this land; he had been to Springfield, Mass., and other places, for this purpose, but could find no record of the title anywhere; and he did not suppose there was any deed of this land on record, but that the whole claim to it depended upon the lottery ticket, and that alone."

Sixth. To the sixth interrogatory he saith: "When Tyler inquired how many acres Doctor Putnam owned, Black answered, about five hundred."

Seventh. To the seventh interrogatory he saith: "Black said he had a claim on this land for the taxes he had paid on * it; he said he had paid taxes on this land twenty-eight or [* 239] twenty-nine years; think he said twenty-nine years; the amount I do not recollect, if he stated it; he said Tyler must pay him the amount of these taxes, and twenty-five per cent. interest, at all events, before he could avail himself of any title to this land, and this he required in addition to the fifty dollars mentioned in my answer to the third interrogatory; he said he would have the land sold for taxes, and get a good title."

Eighth. To the eighth interrogatory he saith: "I do not recollect that Black represented what was the value of this particular piece of land, but he said a part of the same tract had been sold for twelve and a half cents per acre, and was still undivided; so that if Tyler should ever be able to find and get possession of the land, he would find himself an owner in common with others, and it would become necessary for him to get a division before he could do any thing with the land; he said a road had been or would be, laid out through this township, which would much increase the taxes; he assigned as a reason why he wished to purchase the land, that another person had appeared and claimed a large part of it, and he thought it was best for him to be looking out for the remainder; and he had traced it back to Doctor Putnam, and had not found that he had parted with his title; till this claim was made to a part of the land, he had supposed he was in quiet possession, and that the claimants were all dead."

Ninth. To the ninth interrogatory he saith: "Black's first offer was fifty dollars, and he did not vary from this till the morning, when he offered one hundred dollars; whether he professed to be liberal or not I do not recollect, but said it was all he would give till the morning."

Tenth. To the tenth interrogatory he saith: "Black said he could have had the land sold for taxes, and obtained a title that way. I asked him why he had not done so; he said he was afraid other speculators would come in and trouble him, or get the land; I think he mentioned Norcross."

Eleventh. To the eleventh interrogatory he saith: "I made the deed for Tyler and his wife to sign; when I commenced writing the deed, Black took from his pocket a memorandum, and dictated to me a description of the land, and caused me to use words different from those I should have used; he then, for the first time, gave the name of the county in which the land is situated, and the number of the township, which was different from the number he had before given, as I have before stated in my answer to the fourth interrogatory; and he directed me to put in a much larger sum for the consideration in the deed than he gave Tyler, which I did."

[* 240] * It appeared afterwards, in evidence, that the deed from Parsons to Putnam was on record in the office for registering deeds for land in Hancock county, kept in the town of Ellsworth; and it also appeared that Black had no lien upon the land for taxes paid by him.

In December, 1846, Edward Putnam wrote to Tyler, giving an account of Black's visit to him, and his ineffectual efforts to purchase his share of the land.

Tyler v. Black. 13 H.

In June, 1847, Tyler and wife filed their bill against Black in the circuit court of the United States for the district of Maine. It set out their title; averred their entire ignorance of it until informed by Black; charged that he had deceived them by false representations as to their title, and as to the character, quantity, and value of the land, and also by setting up false pretensions to a lien upon it held by him on account of his having paid the taxes. The bill further charged that the land was heavily covered with timber, which could easily be carried to market, and was worth twenty thousand dollars; and that, confiding in the fraudulent representations of Black, they had been induced to sell it for the grossly inadequate consideration of one hundred dollars.

In October, 1849, Black filed his answer. He admitted the title of the complainants, his interview with them; their allegation to him of their ignorance respecting their title; his agency for lands in the neighborhood; but he denied ever having been upon that particular lot, or that he had caused an exploration of it to be made, or that he had any particular knowledge of it; denied that he had ever claimed to have a title or lien for taxes paid; averred that in 1844, or 1845, he accidentally learned that Tilden, (whom he had supposed to be the owner of the whole lot, and for whom he had been the agent,) was the owner of only an undivided part, and that thereupon he had examined the records of the registry of deeds for Hancock county, for the purpose of ascertaining in whom the title was vested, but could find nothing there relative to it. That he then examined a plan-book, and there found the name of Zenos Parsons, Springfield, set down against this lot, as the owner of it; that, in the summer of 1846, he was informed by Tilden that said Parsons conveyed to one Dr. Putnam, of Charlestown, a part of this lot.

Both the bill and answer contained other particulars, which it is not necessary to mention. Much evidence was taken under commissions.

At September term, 1849, the cause came up for hearing upon the bill, answer, pleadings, and evidence, when the circuit court dismissed the bill, and the complainants appealed to this court.

In the argument of the cause here, it was insisted by the counsel * for the defendant that this court had not jurisdiction, as it did not appear in the evidence that the value of the land in controversy was enough to justify the appeal. We think otherwise; one of the witnesses gives an exaggerated estimate, and others not enough to enable us to say what the value of the land is; but the exploration made at the instance of the complainants, satis-

Tyler v. Black. 13 H.

fies us that the land for its timber alone, if it had no other uses, is worth more than two thousand dollars.

If we look too at its value at the time when Black bargained for it, we think it must be admitted that the sum which he offered, and which the complainants accepted upon his representations, was an inadequate price.

But the ground upon which we shall put this case is, that the defendant did not act fairly in the representations made by him to the complainants of the quantity and quality of the land, and in his statement to them that he had a claim upon the land for taxes, which was not true. The quantity of the land is larger than he said it was, and from his agency for the owner of a part of it for many years, and his knowledge how the title was acquired, he must have known what the grant called for. In representing it to be less, he could only have done so to diminish, in the view of the complainants, its value. The untruth in regard to his claim for taxes, without any thing else, is sufficient for us to cancel the deed for a fraudulent misrepresentation.

Stanwood's testimony has been given in detail, because it corresponds with the averments in the bill, and is confirmed in all essential particulars by the admissions of the defendant in his answer, especially in two, which we think decisive of the decree which ought to be made in this case. Those are the defendant's repeated misrepresentations, made at different times and to different persons, and to these complainants when he was bargaining with them for the land, as to the quantity, and his misstatements concerning the taxes paid upon it by his father and himself for many years, especially used by him to the complainant as an inducement for him to sell the land for the small sum which he offered for it.

It cannot be doubted that the defendant knew, when he went to Fairfield to buy this land, where he learned that the wife of this complainant was a daughter of Aaron Putnam, that he knew the latter's interest in the Parsons grant exceeded five hundred acres; indeed, that he positively knew it could not be short of twelve hundred acres. He stated, however, to Stanwood, that it did not exceed five hundred; to Louisa Stanwood the same. When he went to Fairfield to buy the land, he said, in reply to Edward Putnam's inquiry as to the number of acres, *that he did not know any thing about the amount of the land, that he did not know the number of acres, and said there were four or five hundred acres. Soule, another witness, represents, that when questioned concerning the quantity, he answered that he did not know, that there was probably two or three hundred acres, and that the value

was merely nominal. Phebe Hendrick says that Black said, that the number of acres might be two hundred and fifty, but could not exceed three hundred acres. Mrs. Soule says the same. These statements are so inconsistent with the narrative given by Black in his answer of his and his father's agency for many years, for Tilden, who was the owner of a part of the Parsons grant, for which, as the agent of Tilden they had paid the taxes for more than twenty-seven years, that it must be concluded he concealed and misrepresented the quantity to the complainants to induce them to sell. He states that he had learned, as early as February, 1846, that Tilden's interest in the land did not exceed seven hundred and seven acres. That Tilden afterwards told him, that Parsons had conveyed to Putnam a part of the lot, but denies that he had, prior to November, 1846, when he went to have the deed of the complainants to him recorded, any knowledge that Aaron Putnam was the owner of one thousand two hundred acres of the Parsons lot or grant. Now this last may very well be so; but whether he had that knowledge or not, he must have misrepresented as to the quantity of the land, when he so repeatedly undertook to speak of it as not being more than from three to five hundred acres. It is not the less a misrepresentation because he did not know how much Parsons had conveyed to Putnam. He undertook to speak of it as if he did, as an inducement to the complainant to sell to him, and in that way misled him to do so.

The defendant's answer in respect to the averment in the bill of his statement to them of the payment of taxes upon this land is evasive, and directly at variance with the proofs in the cause. He states that his father had been the agent for the owners of land in the township for more than thirty years, and that he had been his associate in such agencies since the year 1833; that it was a part of their agency to pay the taxes assessed on the land under their care; that the taxes on this township have, during all the time of their agency for Tilden, been paid by his father and himself, as though the whole of said lottery lot had been the property of Tilden, and that he did not know until recently that Tilden did not own the whole of it. And in what he means to be a direct denial of the plaintiff's bill in this particular, he denies that he ever claimed any title to the land by virtue of a tax sale and deed therefor, or that he had any lien on the same for taxes paid by himself, but that he told them that he might have *allowed the land to be sold for taxes, and that we, [* 243] meaning his father and himself, had paid the taxes and ought to be reimbursed in the sums so paid, with such interest as the law allowed in cases where land was sold for taxes, which he believed to be twenty-five per cent., and that Tyler replied

that was right, and that whoever owned the land ought to pay them.

The proofs in the cause, of the use which he made of this payment of taxes is, that he represented to the complainant when bargaining for the land that he had a claim upon the land for the taxes he had paid for twenty-eight or twenty-nine years; that Tyler must pay him the amount of the taxes and twenty-five per cent. interest before he could avail himself of any title to the land, and this he required in addition to the fifty dollars which he asked, for the information he had concerning the land, for which he would tell them all he knew about the land. This is a part of Stanwood's evidence. Louisa Stanwood testifies, that the defendant said, that Tyler would have to pay the taxes at any rate before he could do any thing with the land, and he could go home and have the land sold for taxes and get a good title, and Tyler would never be the wiser for it. To Putnam he said the taxes he had paid on the land were two hundred dollars or over; that he claimed a lien upon the land on account of it. Albert G. Soule says, that Black stated, having ascertained that Edward F. Putnam and his wife were heirs to a quantity of land in Maine, which came by their grandfather, Dr. Putnam, that he had come to get a conveyance of it; "that he had paid the taxes on the land for twenty-seven years, and he wanted either that they should convey to him their interest, or refund the amount which he had paid for taxes. Being asked what the amount was, he replied he did not know, but thought two hundred dollars. He was asked for his account; he answered he had it not with him. Another witness, Phebe Hendrick, says, that Black said he had paid the taxes for a long time, amounting to about two hundred dollars. Mrs. Soule repeats the same.

We have, then, from these witnesses, a confirmation of what was said by Black to these complainants when he was bargaining with them for their share of this land. His object evidently was to induce them to take his small offer for the land in consideration of their obligation to repay him taxes, which there is no proof in the cause he ever paid.

In the two particulars stated, we think the entire proceedings of Black in this transaction were inconsistent with fair dealing, and that what was said by him, both as respects the quantity of the land, and the taxes he had paid upon it, amount to a fraudulent misrepresentation, entitling the complainant to the relief of having the deed of conveyance to Black cancelled. We shall direct it to be done.

[*244] *We shall direct the deed from the complainants to the defendant to be cancelled, and that the defendant recon-

Campbell v. Doe. 13 H.

vey to the complainants all the right, title, and interest acquired of him from them in said land. And we further direct that an account shall be taken in the court below of such profits as the defendant may have made from said land, and that he shall account for the same to the complainants, subject to a deduction therefrom of the sum of \$100, paid by the defendant to the complainants as the consideration of their transfer to him of their interest in the land, if the said profits exceed the said \$100, and if no profits have been made, then that the complainants repay to the defendant the aforesaid \$100.

JOHN CAMPBELL, WILLIAM ELLISON, GEORGE STEECE, and HIRAM CAMPBELL, Plaintiffs in Error, v. JOHN DOE, *ex dem.* the Trustees and Treasurer of Original Surveyed Township, No. 1, in Range No. 19, &c.

13 H. 244.

Under the act of May 20, 1826, (4 Stats. at Large, 179,) granting lands for the support of schools, the secretary of the treasury had power to decide, as between the school trustees for a township and one claiming under a private entry, whether the land in question had been duly selected and set apart for the schools of the township; and his decision was final.

THE case is stated in the opinion of the court.

Marsh, for the plaintiff.

Vinton, contra.

* M'LEAN, J., delivered the opinion of the court. [*247]

This action of ejectment is here on a writ of error to the supreme court of Ohio, under the 25th section of the judiciary act.¹ The plaintiffs in error claim title to a quarter section of land under an entry made with the register of the land-office; the defendants claim the same as reserved for school purposes. As both parties claim under an act of congress, either is entitled to a writ of error to have the judgment against the right asserted revised in this court.

By the act of the 20th of May, 1826, congress gave school lands to such townships and fractional townships in the land districts of the United States as had not been provided for, to be selected within such townships by the secretary of the treasury, out of any unappropriated public lands within the land district in which the township was situated. Under that act, fractional township No. 1, range No 19, of the Chillicothe land district of Ohio, was entitled to 160 acres of land.

* On the 24th of the same month the treasury department [*248] issued a circular, through the general land-office, to the

¹ 1 Stats. at Large, 85.

registers of the different land districts, directing them to make selections of the lands granted and return a list to the general land-office, for the approbation of the secretary of the treasury.

The register of the Chillicothe land district caused to be selected the southeast quarter of section No. 15, township 2, range 18, the land now in controversy. A return of this selection was made to the general land-office the 23d October, 1828. This return contained other tracts not made as required by the law, and consequently the list was returned to the register for correction. The errors being corrected the list was again returned to the general land-office. But afterwards, in 1832, a circular from the land-office was directed to the register, accompanied by a printed form and directions, so that the returns of lands selected should be uniform. The tracts selected were required to be noted and reserved from sale. Where good land could not be procured in the township, the selection was authorized to be made in the nearest adjacent township which contained good land. The land above selected is not in township No. 1, range No. 19, nor in the next adjacent township, but in the nearest adjacent township in which good land could be procured.

In pursuance of the above instruction, the register withheld the land from sale. On the 7th March, 1833, he informed the commissioner that "some of the selections which he had reported were half quarter sections, and that others did not lie "either in the township or in the nearest adjacent township where good land exists," "which are not in accordance with the general rules laid down in the commissioner's last circular;" and he says: "I have withheld from sale all the lands selected which were embraced in my two reports," and he inquires whether the fact of his having reported them takes them out of the general rule prescribed for his government; and whether he should consider all the selections heretofore made, and have them made in exact conformity to the instructions."

In answer to the above, the commissioner says: "on the subject of the school lands, selected by you in 1831, I have to state that, as there has been no action of the department on these selections, you are at liberty to withdraw them, and select other lands in their stead, in conformity to my circular of the 30th August, 1832."

Under this letter, it seems, the register permitted Hamilton to enter the land in controversy; but no other school land was selected in lieu of it. On this entry being made, the school trustees [*249] * of the township appealed to the secretary of the treasury, against the sale of the land, and claimed the original selection. And the same being laid before the secretary, he sanctioned and confirmed the original selection. This was done the 9th January, 1834.

The decision of this case must depend upon the validity of Hamilton's entry. He had full notice that the quarter section had been selected for school purposes, and was reserved from sale. This information was given him by the register on his first application to enter it. He then endeavored to purchase it from the trustees. The selection of that tract was made, at first, as the law required, though other tracts on the same list had not been so selected.

The entry by Hamilton may have been permitted by the register, through inadvertence or mistake. This supposition is at least as probable, and indeed more so, than that he withdrew the selection, and failed in his duty to select another tract in place of it. But, in whatever light this may be viewed, we are clear, that the secretary of the treasury had the power, under the act of congress, to make the selection; and his decision, declaring the entry of Hamilton invalid, was, under the circumstances, conclusive. This tract, selected by the secretary under the act of 1826, "is held by the same tenure, as provided in the second section of that act, and upon the same terms for the support of schools, in such township, as section number sixteen is held." By the act of the 3d March, 1803,¹ it is declared that lands appropriated for schools, shall be vested in the legislature of the State in trust, &c.; and in the same act section number sixteen, in each township, was designated for school purposes. If, therefore, the quarter section in dispute was legally selected for school purposes, the legal title became vested in the legislature of Ohio.

The general duties of the commissioner of the general land-office are required to be performed, "under the direction of the head of the treasury department." And where a duty is especially enjoined on the secretary of the treasury, although he may perform it through the commissioner of the general land-office, who may well be presumed to act under his authority where the contrary does not appear; yet where the secretary has interposed and decided the matter, as in the case under consideration, his decision must be considered as the only one under the law. So far, then, as the sanction of the secretary was given to the appropriation of the land in dispute, to school purposes, it must be considered as a valid appropriation.

This view imposes no hardship on Hamilton, as he had notice of the tract selected, and his repeated attempts to purchase the * same land cannot be favorably considered by the court. [* 250] Under the circumstances, no right became vested in him, by reason of his entry of the land, which could be regarded or enforced by a court of equity. The judgment of the state court is, therefore, affirmed.

 Glenn v. United States. 13 H.

JOHN GLENN and CHARLES M. THRUSTON, Appellants, v. THE UNITED STATES.

13 H. 250.

Though the commandant of the port of New Madrid, in upper Louisiana, had power, as the deputy of the Spanish governor of the province, to enter into a contract to grant lands in consideration of the introduction of a colony, &c., and though the facts set forth in his order as the motives of the agreement must be taken as true, yet, before the grantee could apply for a title in form, he must, according to the laws and usages of Spain, have complied with the conditions which formed the consideration of the grant; and as the United States have succeeded to the rights and duties of the Spanish crown, touching this subject, the applicant, who has failed to perform those conditions, cannot demand a title from the United States, under the act of May 26, 1824, (4 Stats. at Large, 52,) revived by the act of June 17, 1844, (5 Stats. at Large, 676.)

The time allowed by the United States for performance of such conditions in grants of this character, did not run after the date of the act of March 26, 1804, (2 Stats. at Large, 287, § 14,) and it was competent for the political department of the government thus to limit the time.

APPEAL from the district court of the United States for the district of Arkansas. The case is stated in the opinion of the court.

Webster and Johnson, for the appellants.

Crittenden, (attorney-general,) *contra*.

[* 252] * **CATRON**, J., delivered the opinion of the court.

In August, 1796, James Clamorgan petitioned Colonel Delassus, then acting as commandant of the post and dependency of New Madrid, for a grant of land fronting on the Mississippi River, for many miles, and running back to the western branches of White River, including a section of country equal in area to 536,904 arpens, as was afterwards ascertained by measurement. To obtain title and possession of this large quantity of land, Clamorgan represented, that he was a merchant residing in St. Louis; that he had been strongly encouraged by the governor-general of the province of Louisiana, to establish a manufactory of cordage, fit and proper for the use of his Spanish majesty's vessels, and especially for the necessities of the Havana, to which place his excellency desired the petitioner to export the cordage, under his, the governor-general's protection; of which facts the commandant was advised, so that he might exercise his power to favor an enterprise likely to become very important to the prosperity of the dependency, and very lucrative to all the inhabitants of upper Louisiana. Furthermore, that the petitioner, Clamorgan, was then connected in correspondence and interest with a powerful house in Canada, which might

procure for him a sufficient number of cultivators to teach [* 253] in that region *the manner of cultivating hemp, and

fabricating it into various kinds of cordage, in the most perfect manner, so as thereby to respond to the views of the general government, which desired the proper prosecution of this enterprise by all proper and honest means that possibly could be used, in order to exempt his majesty from drawing in future from foreigners this article, so important for the equipment of his vessels.

Clamorgan further stated, that, "it is with this hope, that the petitioner has actively made the most pressing demands to obtain from his correspondents, in Montreal, a considerable number of people proper for this culture, who must of necessity by inducement be attracted hither, although at this moment the political circumstances of Canada appear to oppose it; but in more favorable times hereafter this object may undoubtedly be obtained. Notwithstanding which, the petitioner is obliged to assure himself, in advance, from you, Monsieur, a title which may guarantee to him the proprietorship of a quantity of arable land, proportioned to his views, in order to form an extensive establishment, as soon as the time shall appear favorable to his enterprise, and as soon as his correspondents shall be able, without compromising their sense of duty, to cause to emigrate to this country the number of people necessary to give birth to this culture, so much desired by the government."

"Considering, Monsieur, this exposition of the petitioner, and the particular recommendations of his excellency the governor-general of the province, the petitioner hopes that you will be pleased to grant him the quantity of land which he desires to obtain, as well in order to favor him, the execution of all which may contribute to the future success of his project, as to furnish him the means of attracting hereafter from a foreign country an emigration of cultivators, which may not, perhaps, be obtained until after a considerable lapse of time, and upon promises of rewards, which the petitioner will be obliged to fulfil in their favor."

The land solicited is then described; and the petitioner proceeds to set forth the title he desires: "To the end that as soon as it may be in the power of the petitioner, he may be able to establish and select, in the tract of land so demanded, those portions which shall be best fitted to improve for the culture of hemp; because, inasmuch as a great tract of said lands is now drowned in swamps and unimprovable lowland, making it impossible to fix establishments in its whole extent; all to be done that the petitioner may enjoy the land, and dispose of it always as a property belonging to him, his heirs or assigns; and also may distribute them, or part of them, if he think fit, in favor of such person or persons as he may judge

[* 254] proper, to attain, as far * as on him depends, the accomplishment of his project; and the petitioner will never cease to return thanks for your favors."

To this demand of Clamorgan, the commandant responded, and proceeded to grant as follows: "Since, by the exposition contained in this petition, the means of the petitioner are apparent to me, and his new connection with the house of Todd, which will be able to facilitate to him the accomplishment of the enterprise proposed, the profit whereof, if it succeed, will redound in part to the advantage of this remote country, miserable on account of its small actual population; and I giving particular attention to the recommendations which Señor the Baron de Carondelet, governor-general of these provinces, has communicated to me, when he thought fit to appoint me commandant of this post and its dependencies, 'to seek by all means the mode of increasing the population, and of encouraging agriculture in all its branches, and particularly the cultivation of hemp,' it appearing to me that the propositions which the petitioner makes are conducive to the attainment of this last recommendation. In virtue of this, I concede to him, for him and his heirs, the tract of land which he solicits, in the place and with the same boundaries that he prays for, provided there is injury to no one; and so that the same may be established, he shall cause a survey to be made, not obliging him to accomplish this immediately, as from the excessive extent of space, it would cause him great expense, if it were done before the arrival of the families, which he is bound to cause to come from Canada, but so that on their arrival, and being put in possession, it shall be his duty to secure his property, by means of exercising the power of survey, in order afterwards that he may make application to the governor-general, to obtain his approval with the title in form of this his concession."

By various conveyances, the foregoing claim was vested in Glenn and Thruston, who filed their petition in the district court of Arkansas, seeking to have it confirmed according to the act of 1844. They set forth Clamorgan's application; the commandant's decree thereon, and the mesne conveyance.

The attorney of the United States answered, and, among other grounds of defence set up, alleged, that he was wholly uninformed as to the several statements and allegations contained in the petition; that he denied the said statements and allegations, and required full proof thereof; as well as of all other matters and things necessary or material, to establish the validity of the claim of said James Clamorgan.

On these issues the parties went to trial.

The petitioners established by proof that Clamorgan's application, and the governor's decree thereon, were genuine; and *also proved a due execution of the several conveyances [• 255] vesting title in Glenn and Thruston. No other evidence was introduced by either side. The district court dismissed the petition; and from that decree an appeal was prosecuted to this court.

No controversy has been raised drawing in question the validity of the mesne conveyances; nor do we suppose there is any difficulty in locating the land demanded in Clamorgan's petition. *Prima facie*, its locality is sufficiently described to authorize a survey thereof according to Spanish usages.

As regards the commandant's power to make the concession to Clamorgan, there is more difficulty. In 1796, when Delassus was commandant at the post of New Madrid, he also acted as sub-delegate and exercised the faculty of granting concessions for, and ordering surveys of land. In the exercise of his functions he was directly subordinate to the governor-general at New Orleans; and acted according to his instructions. Nor was he in any degree dependent on the lieutenant-governor of Upper Louisiana, residing at St. Louis; as appears by a letter of August 26, 1799, from Morales to Delassus, reciting the facts. The letter is found in document 12, of Senate documents, 2d session, 21st congress, p. 29, and filed as evidence by Judge Peck, preparatory to his trial before the senate of the United States.

In a deposition of Delassus, forming part of the documents filed before the board of commissioners for Missouri, in 1833, and afterwards returned by them for the consideration of congress, Delassus states the fact that he, as commandant at New Madrid, exercised the powers of sub-delegate. Doc. No. 59, p. 17, H. Repts, 1st session, 24th congress.

This commandant's powers were, therefore, coextensive with those of the lieutenant-governor at St. Louis, in distributing the public domain. Having acted under the governor-general, to whose orders and instructions the commandant was bound to conform, it becomes necessary to ascertain what these instructions were in the present instance; and taking the facts stated in Clamorgan's memorial, and in Delassus's decree thereon, to be true, (as we are compelled to do,) it is sufficiently manifest, as we think, that the commandant did stipulate with Clamorgan, in accordance with the governor-general's instructions. That the governor-general had power thus to contract was held by this court, when the agreements of Maison Rouge, and Bastrop, were before it for adjudication; and having done the same through his deputy in this instance, the acts of that deputy cannot

be called in question, on the assumption that he exceeded his powers.

In the document No. 59, above referred to, Delassus [* 256] states * what his practice was, in giving out concessions.

He kept no books in which the fact was recorded; all he did was to indorse his decree on the petition, and return it to the party demanding the land; and the party might hand it to the surveyor, or retain it at his option. That he, Delassus, believed the surveyor made a note of the concession of record; but whether before or after the survey was made, he knew not, as that matter did not concern the deponent. That no time was limited within which the party was bound to survey.

Thus it appears that Clamorgan got the paper title relied on, in the ordinary form, and which he retained in his own hands until after upper Louisiana was delivered to the United States in March, 1804. No possession was taken of the land, or any part of it; nor was it surveyed during the time Spain governed the country; nor has any claimant under Clamorgan ever had possession, so far as this record shows.

The surveys produced to us are private ones, and of no value in support of the claim. And this brings us to a consideration of the mere title paper, standing alone. On its true meaning this controversy depends.

1. The petition of Clamorgan, and Delassus's decree on it, must be construed together; there being a proposition to do certain acts on the one side, and an acceptance on the other, limited by several restrictions.

2. What is stated in either paper as to facts, or intent, must be taken as true.

Such are the rules laid down in *Boisdoré's* case, 11 How. 87, and which apply here.

The country was vacant, and greatly needed population; which could only be drawn from abroad; and this population Clamorgan stipulated that he would supply, and establish a colony from Canada on the land. That he would introduce cultivators of hemp, and artisans skilled in the manufacture of cordage; and would grow hemp and make cordage, to an extent so large as to be of national consequence.

On the faith of these promises the grant was made. As already stated, no step was taken by Clamorgan to perform the contract; all that he did was a presentation of his petition, and the obtaining of Delassus's approval and decree on it. This paper he retained about thirteen years, when it was assigned to Pierre Choteau, May 2, 1809,

by a deed of conveyance for the land claimed. In view of these facts, several legal considerations arise.

It was held in *Arredondo's* case, 6 Pet. 711, that, by consenting to be sued, the United States had submitted to judicial action, and considered the suit as of a purely judicial character, *which the courts were bound to decide as between man [*257] and man litigating the same subject-matter; and that, in thus deciding, the courts were restricted within the limits, and governed by the rules congress had prescribed. The principal rules applicable here, are, that in settling the question of validity of title, we are required, by the act of 1824, to proceed in conformity with the principles of justice; according to the law of nations; the stipulations of the treaty by which the country was acquired, and the proceedings under the same; the several acts of congress in relation thereto; and the laws and ordinances of the government from which the claim is alleged to have been derived.

When deciding according to the law of nations, and the stipulations of the treaty, we are bound to hold, that such title as Clamorgan had by his concession, or first decree, stood secured to him as private property; and that the claim being assignable, the complainants represent Clamorgan. And this brings us to the question as to what right was acquired by the concession, according to the laws and ordinances of the Spanish colonial government, existing and in force when the grant was made. By these, the commandant, Delassus, had authority to contract, and give concessions, and make orders of survey, by first decrees, either with or without conditions; as this court held in the case of *Soulard v. The United States*, 10 Pet. 100; provided the concession was founded on a consideration *prima facie* good; either past, when the concession was made, or to follow in future. Here, the consideration was to arise, by future performance, on the part of the grantee. But, it is insisted that forasmuch as a title vested in Clamorgan by the grant to him, even admitting that it was encumbered with conditions, still, as their performance was to happen subsequent to the vesting of the estate, the want of performance could only be taken advantage of by a proceeding instituted by government for that especial purpose; nor could want of performance be set up as a defence, in this suit.

If the premises assumed were true, the conclusion would necessarily follow; and *Arredondo's* case is relied on in support of this position, and as governing the present case. That proceeding was founded on a perfect title, having every sanction the Spanish government could confer. It was brought before the courts according

to the 6th section of the act of May 23, 1828,' which embraced perfect titles, and was only applicable to suits in Florida.

The subsequent condition there relied on to annul the grant, was rendered immaterial, and perhaps impossible, by the grantor himself, as this court held; and the grantee discharged from its performance. But in Clamorgan's case, the conditions to occupy [* 258] *and cultivate were precedent conditions; they addressed themselves to the governor-general, and their performance was required in advance. Before any right existed in Clamorgan to apply for a complete title, or even to have a public survey, preparatory to such application, he was bound by his contract to establish his colony on the land; and furthermore, to set up his manufactory to make cordage, and to supply it with hemp grown on the land, unless these conditions were waived on the part of the Spanish government. And as we are called on by the complainants to adjudge the validity of this claim, and to order that a patent shall issue for the land, in the name of the United States, it necessarily follows, the same duty is imposed on us that would have devolved on the governor-general, had the Spanish government continued in Louisiana.

By the Spanish regulations, Clamorgan was not recognized as owner of a legal title without the further act of the king's deputy, the governor-general; or the intendant-general, after the power to make perfect grants was conferred on him. Until this was done, the legal title remained in the crown; and the same rule has been applied in this country; no standing can be allowed to imperfect and unrecognized claims in the ordinary judicial tribunals, until confirmed either by congress directly, or by a special tribunal constituted by congress for that purpose.

For our opinion more at large on this subject, we refer to the case of *Menard v. Massey*, 8 How. 305, 306, 307.

As we are asked to decree the final title, and bound to do so, in like manner that the Spanish governor-general or intendant was bound, it follows we may refuse, for the same legal reasons, that they could refuse. And the question presented is, whether we are bound to refuse, according to the face of the contract sued on, and in conformity to our previous decisions in other cases, depending on similar principles?

Very many applications made for perfect titles to the district courts, under the act of 1824, have been resisted, because subsequent conditions had not been complied with: First, such as mill

grants in Florida, where the usual quantity of 16,000 acres was given by concession, with a condition that the mill should be built within a specified time: Second, where grants were made for the purpose of cultivation, and no cultivation followed, as in the case of Wiggins, (14 Pet. 334,) and of Boisdoré, (11 How. 63:) Third, where, by the concession, parties were required by special regulations to levee and ditch on the river's front in lower Louisiana. These were subsequent conditions, just as much as the introduction of a colony of hemp-growers, and the manufacture of cordage, by Clamorgan; and yet, no one has ever successfully maintained that a party having such concession, could *hold the [* 259] land and obtain a perfect title, although he did not build the mill, nor occupy and cultivate, nor levee and ditch, founded on the assumption that performance was unnecessary. In all these cases, it was held that performance was a condition precedent and the real equity, on which a favorable decree for a patent could be founded, under the act of 1824.

If Clamorgan's concession carries with it conditions, similar in principle, it must abide by this settled rule of decision. This depends on the true meaning of his contract with the Spanish authorities. He agreed to establish a colony by introducing a foreign population, and to grow hemp and manufacture cordage, to an amount so large as to make it a national object. By these promises he obtained a concession for more than half a million of arpens of land. A promise of performance was the sole ground on which the Spanish commandant made the concession; and actual performance was to be the consideration on which a complete title could issue.

So far from complying, Clamorgan never took a single step, after the agreement was made; and in 1809 sold out his claim on speculation for the paltry sum of fifteen hundred dollars. Under these circumstances, we are called upon to decide in his favor, according to the principles of justice; this being the rule prescribed to us by the act of 1824, and the Spanish regulations. To hold that an individual should have decreed to him, or to his assignees, a domain of land more than equal to seven hundred square miles, for no better reason than that he had the ingenuity to induce a Spanish commandant to grant the concession, founded on extravagant promises, not one of which was ever complied with, would shock all sense of justice. And such decision would be equally contrary to the policy pursued by Spain, which was, to make grants for the purposes of settlement and inhabitation, and not to the end of mere speculation. We so held in Boisdoré's case, (11 How. 96,) and the principle applies even more strongly in this case than it did in that; as there,

something was done towards compliance; and here, nothing has been attempted.

The remaining ground on which the complainants demand a confirmation is the following: "Because if the concession was upon conditions which should have been complied with in order to vest the estate as against Spain, whilst the conditions were practicable, and might have been performed by the grantee, the estate vested without such performance, because the province was ceded by Spain before the time for performance had expired, and because of the change of government, manners, &c., consequent on that cession."

That Clamorgan could take no step after the change of government, is not open to controversy.

[* 260] * By the 14th section of the act of March 26, 1804, which established the territories of Orleans and Louisiana, Clamorgan was prevented from doing any further act in support of his title, had he been disposed so to do. He was positively prohibited from making settlements on the land, or making a survey of it, under the penalty of fine and imprisonment. But no advantage resulted from this provision to claimants whose concessions carried with them conditions that had not then been complied with.

The 1st section of the act of 1824, in conformity to which we are now exercising jurisdiction, limits the courts, as to the validity of title and standing of the various claims, to the condition they held before the 10th of March, 1804.

By the 3d article of the treaty of cession¹ by which Louisiana was acquired, it was stipulated that the inhabitants of the ceded country should be admitted as soon as possible, and become citizens of the United States, and be maintained in the free enjoyment of their property in the mean time. But no time was provided by the treaty within which conditions appertaining to imperfect grants of land might be performed; this was left to the justice and discretion of our government; and in a due exercise of that discretion, the acts of 1804 and 1824 were passed; and to these acts of congress, the 2d section of the act of 1824 commands us to conform.

The treaty addressed itself to the political department; and up to the passing of the act of 1824, that department alone had power to perfect titles, and administer equities to claimants. And when judicial cognizance was conferred on the courts of justice to determine questions of title between the government and individuals, the limits of that jurisdiction were prescribed, to wit: that no act done by the Spanish authorities, or by an individual claimant, after the 3d day of March, 1804, should have any effect on the title; but that

¹ 8 Stats. at Large, 200.

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its validity should be determined according to its condition at that date.

All claims lying within the territory acquired by the treaty of 1803, which have been brought before the courts, according to the acts of 1824 and 1844, have been compelled to abide by this test; great numbers have been rejected, because the conditions of occupation and cultivation had not been complied with before the restraining act of 1804 was passed, or before the 10th day of March, 1804. Nor have the claimants under Clamorgan more right to complain than others; his neglect extended through nearly eight years, during the existence of the Spanish government; whereas many similar claims have been rejected, where the neglect was not half so long.

If Clamorgan could come forward because of the prohibition, and be heard to excuse himself from performing the onerous *conditions his contract imposed, so could every other [* 261] claimant who had neither taken possession, nor in any manner complied with his contract, do the same; and on this assumption, concessions issued by France or Spain would be without condition, and a simple grant of the land described in the paper. Its genuineness, and proof of identity of the land, would settle the question of title.

No tribunal has ever accorded any credence to this claim; two boards of commissioners have pronounced it invalid; the first in 1811, and the second in 1835. The latter on the ground that the conditions of the grant had not been complied with. By this decision it fell into the mass of public lands, according to the 3d section of the act of July 9, 1832,² which declares that the lands contained in the second class (being those rejected) shall be subject to sale as other public lands. By the act of 17th June, 1844, another opportunity was afforded to apply to the district court for a confirmation; that court agreed with the boards of commissioners, and again declared the claim invalid, because the conditions had not been complied with, and dismissed the petition; and with this decree we concur.

13 H. 261; 17 H. 542.

THE HEIRS OF DON CARLOS DE VILEMONT, Appellants, v. THE UNITED STATES.

13 H. 261.

The principles of the preceding case applied to this case, and the petition dismissed.

THIS was an appeal from the district court of the United States for the district of Arkansas.

¹ 4 Stats. at Large, 567.

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Taylor, for the appellants.

Lawrence and Crittenden, (attorney-general,) *contra*.

[* 266] * CATRON, J., delivered the opinion of the court.

The heirs of Don Carlos de Vilemont filed their petition in the district court of Arkansas, to have a confirmation of a grant for two leagues of land front, by one league in depth, lying on the right descending bank of the Mississippi, at a place called the Island del Chicot, distant twenty-five leagues below the mouth of the Arkansas River; the cypress swamp of the island being called for as the upper boundary of said tract.

The governor-general granted the land on the express conditions, "that a road and regular clearing be made in the peremptory space of one year; and this concession to be null, if, at the expiration of three years' time, the said land shall not be established; and during which time it cannot be alienated; under which conditions the plat and certificate of survey shall be made out and remitted to me in order to provide the interested with the corresponding title in form." The concession was made June 17, 1795. No possession was taken of the land by De Vilemont, nor any survey made or demanded, during the existence of the Spanish government. The petition alleges that possession was first taken in 1807; and as an excuse for the delay, it is stated, that the grantee was commandant at the post of Arkansas up to the end of the year 1802, and confined to his official duties there; and 2dly, that so hostile were the Indians in the neighborhood of the land, that no settlement could be made on it. The proof shows that De Vilemont first took possession in 1822 or 1823. The 2d regulation of O'Reilly of 1770, required that roads should be made and kept in repair, in case of grants fronting on the Mississippi River; and that grantees should be bound within the term of three years to clear the whole front of their lands to the depth of two arpens; and, in default of fulfilling these conditions, the land claimed should revert to the king's domain; nor should proprietors alienate until after three years' possession was held, and until the conditions were entirely fulfilled. In this instance the time was restricted to one year, for making the improvements required by the regulations, and three years were allowed for making an establishment on the premises. In this case where a front of six miles was granted, a clearing to the whole extent was of course not contemplated; yet to a reasonable extent it certainly was; but it was undoubtedly necessary, that an establishment should be made within three years—such being the requirement of the concession, in concurrence with the regulations.

The act of March 26, 1804,¹ prohibited any subsequent entry on the land; and declared void all future acts done to the end of obtaining a perfect title even by an actual settler, if the settlement was not made before the 20th of December, 1803; * De [* 267] Vilemont's title must therefore abide by its condition when the act of 1804 was passed. For further views on this subject we refer to our opinion expressed on Clamorgan's title, at the present term, in the case of Glenn and Thruston v. The United States, 13 How. 250.

We are asked to decree a title, and to award a patent, on the same grounds, that the governor-general of Louisiana, or the intendant, would have been bound to do, had application for a perfect title been made during the existence of the Spanish colonial government. The only consideration on which such title could have been founded, was inhabitation and cultivation, either by De Vilemont himself, or his tenants; and having done nothing of the kind, he had no right to a title; nor can an excuse be heard that hostility from Indians prevented a compliance with the conditions imposed, as Vilemont took his concession subject to this risk; and the alleged excuse that he was commandant of the post of Arkansas, and bound to be constantly there in the performance of his official duties, is still more idle, as he held this office when the concession was made, and knew what his duties were.

The petition was dismissed by the district court, because the land claimed could not be located by survey. The concession is for two leagues front, by one in depth, with parallel boundaries, situate at Chicot Island; the cypress swamp on the island being the upper boundary. Chicot Island is represented in the concession as being twenty-five leagues below the mouth of the Arkansas River. The land now claimed by the petition is represented to lie five leagues below the mouth of that river, at a place known as Chicot Point; being a peninsula included in a sudden bend, and surrounded on three sides by the Mississippi River.

It is difficult to conceive that Chicot Point, lying in fact nearly twenty-five leagues below the mouth of the Arkansas, is the Chicot Island to which the concession refers; but admitting that the Point was meant, (which we believe to be the fact,) still, no cypress swamp is found there to locate the upper boundary; nor is it possible to make a decree fixing any one side line, or any one place of beginning, for a specific tract of land.

Our opinion is that, on either of the grounds stated, the petition should be dismissed, and the decree below affirmed.

17 H. 542; 18 H. 478; 23 H. 312.

WILLIAM NEVES and JAMES C. NEVES, Appellants, v. WILLIAM H. SCOTT and THOMAS N. BEALL, Administrators of WILLIAM F. SCOTT, deceased, and GEORGE W. ROWELL and LAWRENCE G. ROWELL, Executors of RICHARD ROWELL, deceased.

13 H. 268.

The decision in this case, 9 How. 196, affirmed and explained.

This court is not bound by the decision of a state court, upon a question of equity law.

THE case is stated in the opinion of the court.

Johnson, for the appellants.

Coze, contra.

[* 270] * CURTIS, J., delivered the opinion of the court.

This case came on to be heard at the December term, 1849, and was argued by counsel. The decision of the court is reported in 9 How. 196, under the name of William Neves and James C. Neves, appellants, v. William F. Scott and Richard Rowell. At the present term, it was suggested to the court, that at the time when the cause was argued and decided, Richard Rowell, the principal party defendant in interest, was dead; and thereupon proceedings took place which made his representatives parties, and the decree heretofore entered was stricken out, the cause brought forward, and again heard at the present term. It has been elaborately [* 271] and ably argued upon the grounds * on which it was rested at the former hearing, and upon one additional ground, which will first be adverted to.

It appears that a short time before the former argument, the supreme court of Georgia, where the marriage articles in question were made, and the parties thereto domiciled, in a suit between other persons claiming a separate interest under these articles, had made a decision, involving an equitable title like that passed on by this court. This decision was not made known to us at the former hearing; and the respondent's counsel now maintains that it is binding on this court, as an authoritative exposition of the local law of Georgia, by the highest tribunal of that State.

To appreciate this position, it is necessary to ascertain what questions have been decided by the supreme court of Georgia, and are for decision by this court.

By reference to the case in 9 How. 196, it will be found that there were two questions presented to this court, either of which being decided in favor of the complainant, would dispose of the cause.

The first was, whether the trusts manifested by this particular instrument, were what a court of equity deems executed trusts, that is, trusts actually defined and declared and in the view of a court of equity created, or whether a court of equity would treat the instrument as only exhibiting an incomplete intention to create some trusts at a then future period; and the second being, whether the complainants, as collateral heirs of one of the settlers, can have the aid of a court of equity, to enforce the delivery of the property to them, or are precluded from that relief by the fact that they are not issue of the marriage; in other terms, whether by the rules of equity law the complainants are volunteers, or within the consideration of the articles. No question has arisen concerning any statute law of Georgia; nor was it then, nor is it now suggested that any word, or phrase, or provision of the articles, should bear any peculiar or technical meaning, by reason of any local law, or custom. Indeed, the actual intentions of the parties are so plain, that no doubt has been suggested concerning them; and the only inquiry in either court has been, how far, and in favor of what parties, a court of equity will lend its aid to carry those intentions into effect. And, accordingly, the supreme court of Georgia, as well as this court, has resorted to the decisions of the high court of chancery in England, and to approved writers on equity jurisprudence, as affording the proper guides to a correct decision. If, according to sound principles of the law of equity, a trust existed, or the complainants have an equitable right to the specific performance of an agreement to create a trust, then the relief is to be granted, otherwise it is to be refused.

* Such being the nature of the questions, we do not con- [* 272] sider this court bound by the decision of the supreme court of Georgia. The constitution provides that the judicial power of the United States shall extend to all cases in equity arising between citizens of different States. Congress has duly conferred this power upon all circuit courts, and among others upon that of the district of Georgia, in which this bill was filed, and the same power is granted by the constitution to this court as an appellate tribunal.

Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable thereto. These principles may make part of the law of a State, or they may have been modified by its legislation, or usages, or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several States.

But in all the States, the equity law, recognized by the constitution and by acts of congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court.

Such has long been the settled doctrine of this court, repeatedly and steadily affirmed in whatever form the question has been presented. In *The United States v. Howland*, 4 Wheat. 115, Chief Justice Marshall said: "As the courts of the Union have a chancery jurisdiction in every State, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other States." So Mr. Justice Story, in *Boyle v. Zacharie et al.* 6 Pet. 658, says: "The chancery jurisdiction given by the constitution and laws of the United States is the same in all the States of the Union, and the rules of decision are the same in all." See also *Robinson v. Campbell*, 3 Wheat. 222; *Livingston v. Story*, 9 Pet. 654; *Russell v. Southard*, decided at the present term, and reported in 12 How. 139.

But while we do not consider this decision of the supreme court of Georgia a binding authority, on which we have a right to rest our decision, the respect we entertain for that learned and able court, has led us to examine its opinion with great care; and although we find it not consistent with some of the views heretofore taken by us of one of the questions arising under this marriage settlement, we do not find that the ground on which our decision was actually rested was at all examined by that learned court. That ground is: "That

the deed in question is a marriage settlement, complete in [* 273] itself; an executed trust, which * requires only to be obeyed and fulfilled by those standing in the relation of trustees, for the benefit of the *cestuis que trust*, according to the provisions of the settlement." 9 How. 211. This position does not appear to have been taken by the counsel for the complainants in the supreme court of Georgia, nor is it noticed by the court in its opinion; though it is conceded, in the course of the opinion, that while "courts of equity will not enforce a mere gratuitous gift, or a mere moral obligation or voluntary executory trust, it is otherwise, of course, where the trust is already vested."

On the former argument in this court we formed the opinion, that the instrument in question did completely define and declare, and so did create, certain trusts; that they were, in the sense of a court of equity, trusts executed; that the complainants were *cestuis que trust*; that the failure to interpose trustees to hold the property created no difficulty, each party to the settlement being regarded, so far as may be necessary to effectuate their intent, as holding their several estates

as trustees for the uses of the settlement; and so the complainants were entitled to the relief prayed.

We find nothing in the opinion of the supreme court of Georgia in conflict with these views, because we do not find they were there adverted to; and after considering the elaborate and able argument of the respondent's counsel at this term, we remain satisfied of the correctness of our opinion, and judgment must be entered accordingly.

2 B. 499.

WILLIAM W. DE FOREST, GEORGE F. THOMAS, and ROBERT W. RODMAN, Plaintiffs in Error, v. CORNELIUS W. LAWRENCE, late Collector of New York.

13 H. 274.

Though generally, the name by which an article is known in commerce, is taken to include that article in a revenue law, yet, by a course of legislation, it may be made apparent that congress did not intend to include a particular article under a name, which, among commercial men, would include it.

This principle applied to dried sheepskins, having the wool on, under the act of July 30, 1846, 9 Stats. at Large, 42.

THE case is stated in the opinion of the court.

Schley, for the plaintiffs.

Crittenden, (attorney-general,) *contrâ*.

*NELSON, J., delivered the opinion of the court. [* 279]

This is a writ of error to the circuit court of the southern district of the State of New York.

The action was brought by the plaintiffs against the defendant, the late collector of the port of New York, to recover back an excess of duties paid under protest on an article imported from Buenos Ayres, described in the invoices and entries as "sheepskins." The importations were under the tariff act of 1846. The article was imported with the wool on the skins, and by the *instruc- [* 280] tions of the secretary of the treasury, the collector was directed to cause the wool to be estimated and appraised, and to be charged with a duty of thirty per cent. *ad valorem* under schedule C, and five per cent. on the skin, under schedule H. The plaintiffs claim that no more than a duty of five per cent. *ad valorem* should be charged upon the entire article. It is usually described, in the invoices, and shipped as sheepskins, and known in trade and commerce by that designation. The skin is in the same condition as when taken from the animal, except it is dried. It is not dressed.

The court below charged the jury, that the article came within neither of the schedules mentioned, but was more properly a non-enumerated article, and chargeable with a duty of twenty per cent. *ad valorem*. And judgment was rendered in the case accordingly.

By the act of May 19, 1828, 4 Stats. at Large, 271, § 2, a duty is charged upon wool imported on the skin; and direction is given to estimate it as to weight and value, and impose the same duty as on other imported wool.

A similar provision is found in the act of July 14, 1832, *ibid.* 584, § 2, and also, in the act of August 30, 1842, 5 *ibid.* 548.

The article is not enumerated according to its previous designation in the revenue laws in the act of July 30, 1846, Sess. Laws, 68, and of course, no duty is specifically charged upon it in that act as in the previous acts. But it is claimed, on the part of the plaintiffs, that it falls within the description under schedule H. "raw hides, and skins of all kinds, whether dried, salted, or pickled, not otherwise provided for," and which are chargeable only with a duty of five per cent. *ad valorem*.

This description was obviously taken from the act of 1842, § 5, para. 6, "on raw hides of all kinds, whether dried or salted, five per cent. *ad valorem*; on all skins pickled, and in casks, not specified, twenty per cent. *ad valorem*."

The only difference between this act, and the present one is, that the two classes, "raw hides," and "skins," are now ranged in one class, and the duty of five per cent. charged upon each. "Skins pickled," are classed with "raw hides dried or salted," which latter article, it is well known, is extensively imported into the country for the purpose of being manufactured into leather, and the duty is fixed at a low rate for the encouragement of the manufacturer.

In this same act of 1842, it will be remembered, sheepskins, imported with the wool on, were charged with a specific duty, the same as unmanufactured wool, thus distinguishing the article from skins pickled, referred to in the 6th paragraph of the 5th section of that act.

[*281] * We have no doubt, from the association of skins with raw hides in the act of 1846, in connection with the description and classification in the act of 1842, that they should be regarded as an article imported, like raw hides, for the purpose of being manufactured, and, by no reasonable construction, can be regarded as descriptive of the article in question.

The argument is quite as strong, and we think stronger, in favor of ranging the article under the clause in schedule E: "skins of all

kinds, not otherwise provided for," and which is chargeable with a duty of twenty per cent. *ad valorem*.

Neither do we think that the article can be separated, and a duty charged separately upon the estimated quantity of the wool, and upon the skin, according to the rate chargeable upon each. This would be the introduction of a principle in the construction of the revenue acts heretofore unknown, and which has no countenance in the provisions of the acts themselves.

The 20th section of the act of 1842 looks to the component parts of a manufactured article of two or more materials in fixing the duty, but does not separate it, and charge the duty on each part according to the class to which it belongs. It assesses the duty on the entire article at the highest rate at which any of the component parts might be charged.

It is difficult also to say to what length this principle, if admitted, must be carried in construing these acts. It could not consistently be limited to the article in question; for, while skins dried are charged only with the duty of five per cent. *ad valorem*, "hair of all kinds" is chargeable with a duty of ten per cent.; and the same rule of construction that would separate the sheepskin, and charge a duty separately on the wool, and on the skin, would require the deerskin, with the hair on, to be separated, and the duty to be levied on each part. And so, in respect to every other skin dried, salted, or pickled, imported with the hair on.

It is true that in the acts of 1828, 1832, and 1842, in each of which a specific duty was charged upon the wool imported on sheepskins, the appraisers were directed to estimate the weight and value, for the purpose of assessing the duty. But the article was not divided, as no separate duty was assessed upon the skin by either of these acts. The act of 1842 assessed a duty upon "skins pickled and in casks," but skins imported with the wool on, when separated from the wool, would not fall within this description. The whole duty, therefore, that could be properly assessed upon the article was assessed upon the estimated quantity of wool imported upon it.

The article has never been classed in any of the tariff acts under the designation of skins, but has been charged always, since
• it came under the notice of these acts, with a specific duty. [• 282]
It has been thus charged since the act of 1828 down to the present act, a period of some eighteen years. And, although it has been invoiced, and is known in trade and commerce by the designation of sheepskin raw, and dried, and may, generally speaking, be properly ranged under the denomination of skins, as a class, yet, having a known designation in the revenue acts, distinct from the general

Walsh v. Rogers. 13 H.

class to which it might otherwise be assigned, we must regard the article in the light in which it is viewed by these acts, rather than in trade and commerce. For, when congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practised on at the custom-house.

It is but fair to presume, after having been treated by the law-makers for a considerable length of time as an article known by this designation, with a view to the assessment of the rate of duty upon it, that, if intended to be charged specifically, or by enumeration, the designation by which it was known to them would have been used, instead of the one known to trade and commerce, if that should be different.

The 3d section of the act of 1846 enacts, that on all goods, wares, and merchandise, not specifically provided for in the act, a duty of twenty per cent. *ad valorem* shall be charged.

Under the foregoing view of the law of the case, sheepskins imported with the wool on, must be regarded as a non-enumerated article, and fall within this third section.

The probability is that the enumeration was omitted from an oversight, else the article would have been chargeable with a duty in the way provided for in the act of 1842. But, having been omitted, and not specifically provided for, it necessarily comes within the section mentioned, and subject to a duty of twenty per cent. *ad valorem*.

We are of opinion, therefore, the judgment of the court below was right, and should be affirmed.

JOHN WALSH, EDWARD WALSH, and DICKINSON B. MOREHEAD,
Owners of the Steamboat Iowa, Appellants, v. PATRICK ROGERS,
THOMAS SHERLOCK, JOHN B. SIMMONS, EDWARD MONTGOMERY,
JOHN W. BAKER, and P. A. ANSHUTE, Claimants of the Steam-
boat Declaration, her Tackle, Apparel, and Furniture.

13 H. 283.

A case of collision on the Mississippi River, turning wholly on a question of fact.

Fendall and *Chilton*, for the appellants.

Badger, contra.

GRIER, J., delivered the opinion of the court.

This case presents no question of law for our decision.

As is usual in cases of collision, each party makes out a good case by the testimony of the pilot and crew of his own boat. This collision occurred, also, after night; and although the night was *not very dark, the most calm spectator, on such occasions, is subject to great illusions as to the motion and position of the respective vessels. The attention of passengers is also seldom given to the subject until their fears are excited; and the danger to life and property threatened by the sudden shock of the collision, generally renders them incapable of a clear apprehension of what passes at the time, or a distinct recollection of what preceded the event. The pilot and crew of each boat feel bound to exonerate themselves from blame, and consequently cannot be expected to give a very candid statement of the facts. In such cases the oral examination of witnesses before the court, with a stringent cross-examination by skilful counsel, is almost the only method of eliciting truth from such sources. This may be done in the district court, and sometimes, possibly, on appeal to the circuit court. But such a course of sifting out the truth in doubtful cases cannot be pursued here. We are disposed, therefore, to require that the appellant should be held to make out a pretty clear case of mistake in the court below, before he should expect a reversal of their judgment. Raising a doubt on contested facts is not sufficient for the action of this court. An appeal should not be a mere speculation on chances.

It is admitted in this case that if the story told by the libellants' witnesses is true, they are entitled to recover the value of their boat. It is admitted, also, that if the facts testified by the respondents' witnesses are true, the appellants ought not to recover. Their several statements cannot be reconciled; and one or the other of them must be false in all its material allegations.

The libellants' witnesses testify: That on the 1st of October, 1847, about 8 o'clock in the evening, the steamboat Iowa was ascending the River Mississippi, above Morgan's Bend, on a voyage from New Orleans to St. Louis. That she had previously landed a passenger about two miles below the place of collision, on the right bank of the river. That she then crossed the river to the left bank, and was proceeding in her proper place, close to the shore, from ten to twenty-five feet from it. That The Declaration was seen coming down the river towards The Iowa. That The Iowa stopped her engine a minute before the collision. The Declaration turned towards the left bank, and ran quartering into The Iowa, driving her, by force of the collision, against the shore, where she sunk immediately, and so sud-

denly that one of the passengers was drowned in his berth. In support of this statement, the pilot, the captain, fifteen of the crew, and five passengers, have testified. They are supported, also, by two witnesses on the right bank, who testified that The Iowa crossed the river immediately after letting out the passengers. Without criti-

cizing these depositions, as to the probability of the facts [* 285] * stated, or the consistency of each with itself and the others,

we shall merely state the opportunity which they respectively had, by their own statements, for observing the material facts to which they have testified. The pilot and five of the crew were, by their own account, in a situation to know and correctly judge of the facts to which they have testified. The captain and eleven of the crew were not; some were in the cabin, some in the social hall, and many in their beds asleep, till their attention was aroused by the collision. Yet, whether asleep or awake, they all swear as positively to the relative course and position of the vessels before and at the time of the collision, as those who were in a situation to observe them.

Of the five passengers who corroborate the statement of the crew, one was engaged in the social hall playing cards, and another asleep in his berth, till aroused by the collision; a third was discredited by proof of his declarations, soon after the occurrence, that the pilot of The Iowa was drunk, and caused the collision by his incapacity; and a fourth, by his admission that he expected to recover six hundred dollars lost by the sinking of The Iowa, out of the damages to be recovered from the defendants.

On the contrary, the witnesses for the respondents swear distinctly and positively to the following statement of facts:—

1. That The Declaration was coming down the river in the middle of the channel, rather nearer the left than the right bank, having two or more companies of volunteers, with their officers, on board as passengers.

2. That it was a clear, starlight night, and that the decks of The Declaration were covered with passengers in a situation to see correctly every thing that occurred.

3. That The Iowa, when first seen, was about a mile off, coming up the right shore of the river, and had not yet crossed to the left.

4. That when The Iowa came near, or somewhat below The Declaration, she turned suddenly across the river, either because the boat became unmanageable by the pilot from "smelling a bar," or with an intention to cross under the bows of The Declaration.

5. That, from the course pursued by The Iowa, she threatened to strike the wheel-house of The Declaration; and that, to avoid this,

the engine of The Declaration was stopped, and afterwards reversed, so that she was commencing a retrograde movement at the time of the collision.

6. That The Iowa came on under a full head of steam, and impinged herself against the bows of The Declaration, breaking her flagstaff, and causing the death of one of the soldiers on the deck.

*7. That the head of The Declaration was turned round [* 286] quartering up stream by force of the collision, and that The Iowa continued under a full head of steam till she struck the left bank of the river, and there sunk in a few minutes.

Nineteen of the crew of The Declaration were examined. Eleven of them were in a situation to see what they testify to. Eight others, whose attention was first called to the matter by the stopping of the engine and backing the boat, corroborate the others as to that fact, without attempting to testify to facts which could not have come under their personal notice. Their statements are circumstantial, consistent, and probable, while those detailed by appellants' witnesses are improbable and almost incredible. But what is perfectly conclusive of the case, is the fact that the testimony of these nineteen witnesses, who may be supposed to be under the usual bias on such occasions, is completely corroborated by that of seventy of the passengers. Fifty-four of these were standing on the decks, or other parts of the vessel, where they had a full view of the whole transaction, from the time that the boats came within sight of each other, till The Iowa sunk to the bottom. They all concur in swearing positively to the facts we have stated, and that they could not be mistaken. The remaining sixteen corroborate them as to the stopping and backing of the engine of The Declaration, and the position of the boats immediately after the collision.

If confidence can be placed in human testimony, it is plain that the libellants are not entitled to the judgment of the court in their favor.

Indeed, the only argument which has been urged against this overwhelming mass of testimony is, that the numerous witnesses of respondents coincide so completely in all the circumstances and facts related, not only in their order of narration, but in their language and phraseology, that it leads to the suspicion of a factitious story, got up after consultation. But the number of the witnesses, the respectability and standing of many of them, the fact that their testimony was taken at different times, by different commissioners, at different places, leaves no room for such an imputation. The coincidence of statement and similarity of language and expression may well have

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arisen from the fact that their testimony was taken under the act of congress, *ex parte*, without cross-examination, and probably by an agent who had the same stereotyped leading questions put to each of the witnesses in the same sequence and in the same words.

While we are on this subject, it will not be improper to remark, that when the act of congress of 1789¹ was passed, permitting *ex parte* depositions, without notice, to be taken where [* 287] * the witness resides more than a hundred miles from the place of trial, such a provision may have been necessary. It then required nearly as much time, labor, and expense to travel one hundred miles as it does now to travel one thousand. Now, testimony may be taken and returned from California, or any part of Europe, on commission, in two or three months, and in any of the States east of the Rocky Mountains in two or three weeks. There is now seldom any necessity for having recourse to this mode of taking testimony. Besides, it is contrary to the course of the common law; and, except in cases of mere formal proof, (such as the signature or execution of an instrument of writing,) or of some isolated fact, (such as demand of a bill, or notice to an indorser,) testimony thus taken is liable to great abuse. At best, it is calculated to elicit only such a partial statement of the truth as may have the effect of entire falsehood. The person who prepares the witness and examines him, can generally have just so much or so little of the truth, or such a version of it, as will suit his case. In closely contested cases of fact, testimony thus obtained must always be unsatisfactory and liable to suspicion, especially if the party has had time and opportunity to take it in the regular way. This provision of the act of congress should never be resorted to unless in circumstances of absolute necessity, or in the excepted cases we have just mentioned.

Let the judgment of the circuit court be affirmed.

20 H. 296; 7 Wal. 196.

WASHINGTON and SANDERS TAYLOR, Plaintiffs in Error, v. JOHN DOE,
ex dem. AUSTIN MILLER.

13 H. 287.

Where a judgment lien existed on land at the time of its seizure and sale on the execution, and, under the law of Mississippi, an appraisal and suspension of proceedings took place, and the debtor died before the issue of a *venditioni exponas*, under which the land was sold to satisfy the execution. *Held*, 1. That the appraisal, &c., did not displace the lien. 2. That the sale upon the *venditioni exponas* was merely a continuation of the proceedings under the execution begun in his lifetime. 3. That his death, after the tests of the execution, and the seizure of the land thereon, did not render a *scire facias* necessary, and the levy and sale were regular and legal.

¹ 1 Stats. at Large, 88.

THE case is stated in the opinion of the court.

Volney E. Howard, for the plaintiffs.

Vinton and *Stanton*, contra.

* DANIEL, J., delivered the opinion of the court. [* 290]

This was an action of ejectment, instituted in the court below by the plaintiff, a citizen and inhabitant of the State of Tennessee, against the defendants, citizens and inhabitants of the State of Mississippi; and the facts proved in the cause, and about which there appears to have been no contrariety of opinion, were to the following effect. That the plaintiff and the defendants derived their titles from one William Crane, who was at one time seized and possessed of the demised premises. That being so seized and possessed, Crane conveyed the land, on the 21st of September, 1840, to one Pitser Miller, for the purpose of securing a debt in said conveyance mentioned; that this deed from Crane, after having been proved, was delivered to the probate clerk of the county wherein the land was situated, on the 7th day of December, 1840, and was on that day recorded. That *this land was afterwards duly [* 291] advertised for sale under the trust above mentioned, was regularly sold in pursuance thereof, by the trustee, on the 20th day of April, 1843, to the lessor of the plaintiff, for the sum of \$1,000, and conveyed to him by the trustee by deed which was acknowledged and recorded on the day and in the year last mentioned. That the defendants were in possession of the demised premises at the commencement of this action, and that the land in dispute was worth \$4,000.

The defendants then proved, that on the 17th of November, 1840, a judgment was recovered in the circuit court of the county in which the demised premises are situated, against the said Crane, for the sum of \$6,000; that, on this judgment, an execution was sued out against the goods and chattels, lands and tenements, of the said Crane, returnable to the first Monday in June, 1841, which execution on the same day on which it was sued, came to the hands of the sheriff of the county, and was by him levied on the land in controversy on the 16th of April, 1841. That thereupon the said Crane claimed the benefit of the valuation law of Mississippi, and in pursuance of that law, the land was valued at \$6,000, and that being after such valuation advertised and offered for sale, and two thirds of the appraised value not having been offered for the said land, the execution and papers connected therewith were returned to the clerk's office of the

court of the county, according to law; that after the expiration of twelve months, namely, on the 30th of May, 1842, a writ of *venditioni exponas*, tested on the 1st Monday in March, 1842, was sued out by the clerk of the county aforesaid, directed to the sheriff of said county, commanding him to sell the land which had been levied upon, and on which the appraisement and suspension had been taken, as before set out; that, by virtue of this writ of *venditioni exponas*, the said sheriff, after duly advertising the land, sold the same on the 17th day of August, 1842, when the defendants became the purchasers thereof, at the price of \$800, and having paid the purchase-money, the sheriff conveyed to them the said land by a deed in due form of law, which was acknowledged and recorded on the 17th of August, 1842, the date of the said deed; that under this deed the defendants were in possession of, and claimed title to, the land in question.

The plaintiffs' lessor then proved that Crane, upon an execution against whom the land had been seized, and at whose instance that execution had been stayed under the provisions of the statute, departed this life on the 20th of February, 1842, during the twelve months' suspension of the proceedings on that process, and before the [* 292] test and suing out of the *venditioni exponas* under which the land had been sold, and purchased by the tenants in possession.

Upon the foregoing facts, the judge charged the jury, that if they believed from the evidence, the *venditioni exponas*, by virtue of which the land in controversy was sold, and under which the defendants became the purchasers thereof, had been sued out and tested after the death of Crane, and without a revival of the judgment by *scire facias*, then the sale and purchase were void, and conferred no title on the tenants in possession.

With reference to the proofs in this case, and the charge pronounced thereon by the court below, a single question only has been discussed by the counsel, and it is certainly that which must be decisive upon the judgment of this court, namely, the question involving the validity of the proceedings upon the judgment against Crane, and the legal consequences flowing from those proceedings. By the statute of Mississippi, *vide* Howard & Hutchinson's Collection, c. 34, § 5, p. 344, deeds of trust and mortgages, are valid as against creditors and purchasers, only from the period at which they are delivered to the proper recording officer. By the law of the same State, *vide* How. & Hutch. c. 47, § 43, p. 621, a judgment *proprio vigore* operates a lien upon all the property of a defendant from the time that it is rendered.

The trust deed from Crane to Pitser Miller, not having been re-

coordinated until after the judgment against Crane, and the sale under the trust not having been made until after the lapse of more than three years from the judgment, and not until two years after the levy of the execution upon the lands under that judgment, the title derived from the sale and conveyance by the trustee, must, by the operation of the statutes above cited, be inevitably postponed to the rights of the claimant under the judgment, unless the latter, with the proceedings had thereon, can have been rendered null by some vice or irregularity which deprived them of legal validity.

It is insisted, for the lessor of the plaintiff, that such vice and irregularity are manifested by the facts which controlled the charge of the judge of the court below, namely, the suing forth of the *venditioni exponas* and the proceedings upon that process, after the death of the defendant in that judgment, and without any revival thereof against the representative of that defendant.

In considering the objection thus urged, it must be taken as a *concessum* on all sides, that, by the law of Mississippi, the judgment against Crane operated as a lien on his land, and that by the execution and levy, the fruits of that judgment, the lien had attached particularly and specifically upon the subject of *its [*293] operation. So far then as the rights of the parties to the judgment and the subject-matter to be affected by those rights were concerned, every thing was determined; all controversy was closed. The law had taken the subject entirely to itself, to be applied by its own authority and its own rules. Did the indulgence of appraisalment, and the temporary suspension allowed in a certain predicament to the debtor, alter the rights or obligations of the parties, or change the *status*, or liability, or appropriation, of the subject which the law had already taken by its own hands? To admit of any conclusions like these, would be to open again controversies already closed, and to wrest from the fiat of the law, the subjects it had specially and absolutely applied. The privilege of appraisalment and suspension was in itself a great indulgence; it would become an opprobrium to justice, if it could be converted into a means of abrogating rights which she had expressly and deliberately conferred. The appraisalment and suspension wrought no change in the relative position of the parties, it neither released nor weakened the hold taken by the law on the subject, but only completed the proceedings on the conditions which the statute had prescribed, the operation it had begun, and which it had the regular authority to fulfil. We regard the *venditioni exponas* in this case merely as a continuation and completion of the previous execution by which the property had been appropriated, and was still in the custody of the law, and not as a separate, independent, much

less an original proceeding, the offspring or result of a distinct and further adjudication. This interpretation is in conformity with the meaning and purpose of the process of *venditioni exponas*, and with the terms of that writ as provided in the statute of Mississippi, which runs in the following language, namely, (*vide* How. & Hutch. Col. c. 42, § 18,) "We command you that you expose to sale those goods and chattels, lands and tenements of A B, to the value of which, according to our command, you have taken, and which remain in your hands unsold as you have certified to our judges, of our court, to satisfy C D the sum of whereof in our said court he hath recovered execution against the said A B by virtue of a judgment in the said court, &c.," thus showing the consummation of the right of the plaintiff, the divestiture of possession of the defendant, and the transfer of that possession to the custody and possession of the law by the levy of the previous execution. Considering this to be the situation of the property, and regarding the force of the judgment and levy as not having been affected by the appraisement and suspension of sale, it becomes unimportant to investigate the results attempted to be deduced from the fact [*294] *that the *venditioni exponas* was sued out after the death of the defendant Crane. According to our view, this fact would have been immaterial both upon the rules of the common law and upon the provisions of the stat. of the 29 Car. II., adopted in many of the States; for by the former the execution would have been valid if tested before the death of the defendant, and by the statute if delivered to the officer before that period; but in this instance not only did the lien which could be enforced by *fiery facias* exist from the date of judgment, according to the statute of Mississippi, but was actually consummated by seizure in the lifetime of the defendant in the judgment. Upon the point of the validity of an execution against the personalty, if tested and sued in the lifetime of the debtor, numerous authorities might be cited from the English decisions and from the adjudications of the state courts, as well as the decision of this court in the case of *Erwin's Lessee v. Dundas et al.* in 4 How. 58, in which many of the cases have been reviewed. A particular reference to the cases upon this point, however, is not deemed important in the present instance, though it may not be altogether out of place to refer to several decisions of the supreme court of Mississippi, ruling a doctrine which would go very far in sustaining the title of the defendants in the ejectment, admitting that the validity of the first execution and levy on the judgment against Crane was a matter regularly open for examination. Thus the cases of *Smith and Montgomery v. Winston and Lawson*, 2 How. Miss. R. 601; of *Drake et al. v. Collins*, 5 *ibid.*

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253; and of *Harrington v. O'Reilly et al.* 9 Sm. & Marsh. 216, have laid it down as the law of Mississippi, in relation to real as well as personal estate, "that a sale made under an execution which issued without a revival of the judgment is not absolutely void but voidable only, and cannot be avoided collaterally."

This last question this court do not feel themselves now called upon to settle; considering the levy under the first judgment against Crane, and the lien thereby created as having been consummated, and the property placed by the proceedings in the custody of the law, they regard the title of the defendants below derived from the judgment, the levy of the *fieri facias*, and sale under the *venditioni exponas*, as regular and valid, and one which should have been sustained. The judgment of the district court is therefore reversed, and the cause remanded to that court to be tried upon a *venire facias de novo*, in conformity with this opinion.

THOMAS TREMLETT, Plaintiff in Error, v. JOSEPH T. ADAMS.

13 H. 295.

Under the warehousing act of August 6, 1846, (9 Stats. at Large, 53,) an importer had not a right, as soon as the law was passed, and independently of any regulations by the secretary of the treasury, to land his goods at the port of delivery to which they were destined, and store them there, on giving such bonds as that act required.

The act was confined to ports of entry, until extended by the action of the secretary, to ports of delivery.

ERROR to the circuit court of the United States for the district of Massachusetts. The case is stated in the opinion of the court.

Sherman, for the plaintiff.

Bibb, contra.

* TANEY, C. J., delivered the opinion of the court. [* 302]

This is an action brought by the plaintiff against the collector of the port of New Bedford, for refusing to permit the plaintiff to enter for warehousing, at Wareham, sundry cargoes of coal, imported from Pictou, Nova Scotia, which were shipped for Wareham, and arrived in the months of September and October, 1846. Wareham was a port of delivery in the collection district of which New Bedford was the port of entry; and the collector, in refusing to permit them to be entered for warehousing at Wareham, acted under the directions of the secretary of the treasury. The plaintiff was required to pay in cash the duties imposed by the act of 1842,¹ before

¹ 5 Stats. at Large, 548.

the permit for landing at Wareham was granted. And this suit is brought to recover the difference between the duties paid and the duties to which the coal would have been liable if it had been warehoused at Wareham and remained in store as the plaintiff desired until the reduced tariff went into operation. The case depends upon the construction of the warehousing act of August 6, 1846.

The law is framed in very general terms, referring to other laws for some of its regulations; and containing but few specific directions as to the manner in which it should be carried into execution. And it authorizes the secretary of the treasury to make from time to time such regulations, not inconsistent with law, as might be necessary to give full effect to the provisions of the act, and secure a just accountability under it. This mode of legislation has naturally led to some ambiguity, and has given rise to this controversy.

The act went into operation on the day it was approved by the President. And the plaintiff insists that, under its provisions, he was entitled, as soon as it passed, to land his goods at the port of delivery upon bonding for the duties; and to have them placed there in store in order to avail himself, if he thought proper, of the reduced tariff, which took effect on the 2d of December, in the same year. The 6th section of the tariff act of July 30, 1846,¹ which passed a few days before the warehousing act, of which we are now speaking, provided that all goods imported after the passage of that law, and remaining in the public stores on the 2d of December following, when the act went into operation, should be subject to no other duty upon entry thereof than if they had been imported after that day.

In expounding the warehousing act, it must be borne in mind, that it was not passed for the purpose of enabling the importer to avail himself of the reduced rates of duty. It is a part of the general and permanent system of revenue; and its evident object is to facilitate and encourage commerce by exempting the importer from the payment of duties, until he is ready to bring his goods into market. The opportunity it afforded of taking advantage of the reduced rates of duty was an accidental circumstance arising from the time at which it happened to be passed. The provisions in the 6th section of the tariff act of July 30, 1846, had no reference to goods entered for warehousing. There was no law at that time which authorized the importer so to enter them. And although the warehousing act, which passed a few days afterwards, enabled the importer, by warehousing his goods, to take the benefit of the provisions of the previous law, yet it was not passed for that purpose. And it must be regarded and

¹ 5 Stat. at Large, 43.

interpreted, not as an act passed for a temporary purpose, or to meet a change of tariff, but as one intended to be equally applicable to goods imported after the 2d day of December, as to goods imported between the 30th of July and that time. The plaintiff had the same legal rights in this respect at the time he offered to enter his coal at Wareham as an importer of the present day, and nothing more; and no greater advantages were intended to be given him by the warehousing act.

Previous to the passage of this act, no goods, chargeable with cash duties, could be landed at the port of delivery until the duties were paid at the port of entry. The importer had no right to land them anywhere until they had passed through the custom-house. And they could not be landed at the port of delivery without the permit of the proper officer at the port of entry. This [* 304] permit in effect delivered them to the owner to be landed under the usual inspection, and sold and disposed of as he thought proper; and the permit could not be granted unless the duties had been paid.

There could, therefore, but rarely be any necessity for public stores or warehouses at a port of delivery, before the passage of the warehousing act.

It was otherwise at ports of entry. The importer himself had no right to land them even at a port of entry before the duties were paid. But when the entry at the custom-house was imperfect, for want of the proper documents, or where the goods were damaged in the voyage, and the duties could not be immediately ascertained; or the cash duties were not paid after the forms of entry had been complied with; in all of these cases the collector was directed, by existing laws, to take possession of such goods, and place them in public stores, and retain them until the duties were paid. And as all this was to be done at the port of entry, public stores were necessary at such ports; and they had accordingly been provided for by law, before the passage of the warehousing act.

Now, the warehousing act, so far as the landing and storing of goods is concerned, places goods entered for warehousing upon the same footing with goods upon which the duties have not been paid. It provides, that in all cases of failure or neglect to pay the duties within the period allowed by law to the importer, to make entry thereof, or whenever the owner, importer, or consignee, shall make entry for warehousing in the manner directed in the act, the collector shall take possession of the goods and deposit them in the public stores, or in other stores to be agreed on by the collector or other chief officer of the port, and the importer of the goods to be secured

in the manner provided for in the act of 1818,¹ relative to the warehousing of wines and distilled spirits. The warehoused goods, therefore, are to be taken possession of by the same officer and stored, and treated like goods upon which the importer had failed to pay duty. And, as the latter were necessarily to be taken possession of at the port of entry, and accustomed to be stored there, the natural inference from this association is, that the law contemplated the storage of warehoused goods at the same place, and did not mean to give the importer a right to store them at any port of delivery to which he might have chosen to ship them. The warehousing act gives him no peculiar privileges over the importer of goods directed to be placed in the public stores because the duties were not paid; nor any greater right to select for himself the place of storage.

The second section of the act strengthens this construction of the * 1st section. It provides that warehoused goods, deposited in the public stores in the manner provided in the 1st section, might be withdrawn and transported to any other port of entry; and directs that the party should give bond for the deposit of them in store, in the port of entry to which they shall be destined. The use of the words "ports of entry," in this provision, implies that they were to be stored in a port of that description in the first instance, and to be deposited again in a like port, if they were transported coastwise.

Again, the directions as to the manner in which they are to be secured while they remain in the store, and to be delivered to the party when he is entitled to receive them, leads to the same conclusion. They cannot be withdrawn without a permit from the collector and naval officer of the port at which they are stored. And as there is no naval officer appointed or needed at the port of delivery, this provision would appear to have contemplated the storage at a port of entry, and not of delivery. There are certain expressions in the law which may be applied to a port of delivery as well as of entry. But they were introduced for the purpose of authorizing the secretary of the treasury, under the power to make regulations, to have suitable storehouses to provide at a port of delivery, when the nature and importance of the trade might require it.

The act of 1799, c. 22, § 21, (1 Stat. at Large, 642,) authorizes the collector, with the approbation of the principal officer of the treasury department, to employ proper persons as weighers, gaugers, measurers, and inspectors at the several ports within his district; and also, with the like approbation, to provide, at the public expense, storehouses for the safe keeping of goods, and such scales, weights, and

¹ 8 Stat. at Large, 469.

measures, as may be necessary. The secretary and collector were, therefore, under this law, to determine where storehouses were necessary; and might provide them at a port of delivery, if they believed the interests of the public and of commerce demanded it. But the law confided it to their discretion, to determine whether they should or should not be provided at any particular port of delivery; and the warehousing act has not changed the law in this respect, and does not require that there should be public storehouses at every port of delivery at which the importer might wish to warehouse his goods.

The record shows, that after this transaction took place, the secretary did authorize goods to be warehoused at Wareham. But the question before us is not whether he might not have authorized it before; but whether, independently of any regulation by the secretary, the importer had not an absolute right, as soon as the law was passed, to land his goods at the port of delivery to [* 306] which they were destined, and store them there, upon giving the bonds which the law requires. We think he had not, and that the right, given under the warehousing act, was confined to a port of entry, unless extended, by regulation of the secretary, to a port of delivery.

Indeed, the execution of the law would be impracticable under the construction contended for by the plaintiff. For it directs that the bond to be taken on the entry for warehousing, shall be prescribed by the secretary; and it is made his duty to make regulations to carry the law into full effect, and secure a just accountability. These things required time; and the collector could not act without them. Yet, if the plaintiff's construction be the correct one, his right to enter his coal for warehousing at Wareham was as absolute the day after the law passed as it was when he offered to make the entry. For if the law gave him the right, independently of any regulations by the secretary, he was not bound to wait until they were made and the form of the bond prescribed; but might have demanded his rights on the 7th of August, and sued the collector if he failed to obtain them. It is evident that congress could not have intended to confer upon the importer this right. Nor can the law receive that construction without rejecting the provisions which authorize the secretary to prescribe the form of the bond, and to direct the manner in which the act was to be carried into effect. These provisions, in relation to the power of the secretary, are important, and were intended to guard the public against any abuse of the privileges which the warehousing act gave to the importer.

Moreover, many of the ports of delivery are at places where the

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trade is trivial and unimportant, and where it would be difficult to procure suitable storehouses for a cargo unexpectedly arriving and demanding to be warehoused. In many of them there are not a sufficient number of officers to superintend the landing and warehousing of a cargo of an ordinary ship, and guard it afterwards from being improperly withdrawn. The warehousing act does not authorize the appointment of additional officers, at ports of delivery, nor provide for any additional expenses to be incurred by the public in carrying it into execution. And if the collector is bound to grant a permit to land the goods, at any port of delivery which the importer may select for his shipment, it is easy to foresee the abuses to which it would lead; and the frauds that might be practised under it, congress can hardly be presumed, from any general or ambiguous language, to have intended, in this law, to dispense with all the safeguards which had been so carefully provided and preserved in [* 307] previous acts. We think neither its words nor its manifest object will justify such a construction, and that the collector was right in refusing the permit to the plaintiff to land and warehouse the coal in question at Wareham.

As regards the small balance of the plaintiff's deposit which remained in the collector's hands after the payment of the legal duties, it is no ground for reversing the judgment of the circuit court. The defendant offered to pay it, but the plaintiff refused to receive it. The money placed in the hands of the collector for the estimated duties was a deposit in trust for the United States for the amount that should be found actually due; and for the plaintiff for the balance, if any should remain after the duties were paid. And as the plaintiff refused to receive this balance when tendered, it continues a deposit in the hands of the defendant with the plaintiff's consent; and he cannot subject the collector to the costs and expenses of a suit until he can show that it is wrongfully withheld.

The judgment of the circuit court is therefore affirmed, with costs.

THE PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD
COMPANY, Plaintiffs in Error, v. SEBRE HOWARD.

13 H. 307.

Where a formal record is not required by law to be made up, those entries which are permitted to stand in its place, are admissible in evidence.

The docket entry of an action is admissible evidence of its mere pendency in court.

Evidence that a corporation, through its counsel, treated a paper as its deed, in the course of a trial, is admissible, as against the corporation, to prove that the seal, attached to the paper, is the seal of the corporation.

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An exception which became wholly immaterial in the progress of the trial, cannot be assigned as error.

Though it may be shown that at the time of the sealing of an indenture it was agreed, that the instrument should not be the deed of a corporation until a condition should be complied with, such an understanding prior to the sealing, and in no way connected with that act, cannot be shown.

To read the deposition of a deceased witness, taken in a former cause, it is not necessary the parties should be identical.

If a party have not opportunity to show an estoppel by pleading, he may exhibit the matter thereof in evidence, and the court and jury are bound thereby.

If, in an action of *assumpsit* against a corporation, the defendant insist that the writing, on which the action is founded, bears the corporate seal, and defeats the action upon the ground that it should have been an action of covenant, the defendant is estopped from denying, on the trial of an action of covenant, that the paper is the deed of the corporation. Though two persons are named in an indenture, as "the party of the first part," if only one seals the deed, he alone is that party, and may sue alone on covenants with "the party of the first part."

Rules as to construing covenants to be dependent or otherwise.

Under a power reserved to a party to declare a contract no longer binding, *held*, this extended only to the work which remained to be done, and did not deprive the contractor of compensation for what had been done.

Certain special covenants and stipulations in an indenture between a railroad corporation and a contractor for building the road, construed and applied.

In an action for breach of a contract to permit the plaintiff to construct a railroad and to pay him therefor, at certain rates, the profits, meaning thereby the difference between the cost to him of doing the work, and the price to be paid for it, are a proper subject of damages.

THE case is stated in the opinion of the court.

Schley, for the plaintiff.

Nelson and Johnson, contra.

* CURTIS, J., delivered the opinion of the court. [* 330]

Sebre Howard brought his action of covenant broken, in the circuit court of the United States for the district of Maryland, and upon the trial the defendants took seven bills of exception, which are here for consideration upon a writ of error. Each of them must be separately examined.

The first raises the question whether Howard could prove that a certain suit was pending in Cecil county court by the testimony of the clerk of that court to the verity of a copy of the docket-entries made in that suit by him, as clerk.

* It is not objected that a copy of the docket-entries was [* 331] produced instead of the original entries, because no court is required to permit its original entries to go out of the custody of its own officers, in the place appointed for their preservation; but the objection is, that a formal record ought to have been shown.

There are two distinct answers to this objection, either of which is sufficient.

By the act of assembly of Maryland, 1817, c. 119, the clerk of the county court is not required to make up a formal record. The docket entries and files of the court stand in place of the record. When a formal record is not required by law, those entries which are permitted to stand in place of it, are admissible in evidence. Several judicial decisions in England have been referred to by the counsel of the plaintiff in error, to the effect, that the finding of an indictment at the sessions cannot be proved by the production of the minute-book of the sessions, from which book the roll, containing the record of such proceedings, is subsequently made up. See 2 Phil. Ev. 194. But the distinction between those cases and a case like this, is pointed out in a recent decision of the court of King's Bench, in *Regina v. Yeoveley*, 8 Ad. & El. 806, in which it was held, that the minute-book of the sessions was admissible to prove the fact that an order of removal had been made, it appearing that it was not the practice to make up any other record of such an order; and Lord Denman fixes on the precise ground on which the evidence was admissible in this case, when he says, "the book contains a caption, and the decision of the sessions; and their decision is the fact to be proved."

So in *Arundell v. White*, 14 East, 216, the plaintiff offered the minute-book of the sheriff's court in London, containing the entry of the plaint, and the word "withdrawn," opposite to the entry, and proved it was the usual course of the court to make such an entry when the suit was abandoned by the plaintiff; it was held to be competent evidence to prove the abandonment of the suit by the plaintiff, and its final termination. In *Commonwealth v. Bolkom*, 3 Pick. 281, it was decided that the minute-book of the sessions, showing the grant of a license to the defendant, was legal evidence of that fact, there being no statute requiring a technical record to be made up.

And in *Jones v. Randall*, Cowper's Rep. 17, copies of the minute-book of the house of lords were admitted in evidence of a decree, because it was not the practice to make a formal record.

The principle of all these decisions is the same. Where the law which governs the tribunal requires no other record than the one a copy of which is presented, that is sufficient. In Maryland, [* 332] * no technical record was required by law to be made up by the clerks of the county courts; and, therefore, no other record than the one produced was needful to prove the pendency of an action in such a court.

But there is another point of view in which the evidence was clearly admissible.

The fact to be proved was, the pendency of an action. An action is pending when it is duly entered in court. The entry of an action in court is made, by an entry on the docket, of the title of the case, by the proper officer, in the due course of his official duty. Proof of such an entry being made by the proper officer, accompanied by the presumption which the law entertains, that he has done his duty in making it, is proof that the action was duly entertained in court, and so proof that the action was pending; and if the other party asserts that it had been disposed of, at any particular time after it was entered, he must show it. The docket-entry of the action was therefore admissible for this special purpose, because it was the very fact which, when shown, proved the pendency of the action, until the other party showed its termination.

The second bill of exceptions was taken to the ruling of the court admitting a witness to testify that he was present at the trial of the above-mentioned case in Cecil county court, in December, 1847, in which Sebre Howard and Hiram Howard were shown by the docket-entries to have been plaintiffs, and the Wilmington and Susquehannah Railroad Corporation defendant; that the plaintiffs at that trial relied on a paper writing, shown to the witness, and set out in the bill of exceptions; that one of the counsel of the defendant had in his possession another paper writing, also shown to the witness, and being the deed declared on in this suit; and that the defendant's counsel handed this last-mentioned paper to the presiding judge, and spoke of it as the true and genuine contract between the parties.

To render the ruling to which this bill of exceptions was taken intelligible, it is necessary to state that the Wilmington and Susquehannah Railroad Corporation was the defendant in that action, which was *assumpsit*, founded on the paper first spoken of by the witness, which did not bear the seal of the corporation; that by the act of assembly of 1837, c. 30, the Baltimore and Susquehannah Company, the Baltimore and Port Deposit Company, and the Philadelphia, Wilmington, and Baltimore Company, were consolidated, under the name of the Philadelphia, Wilmington, and Baltimore Railroad Company, and that this action being covenant, against the Philadelphia, Wilmington, and Baltimore Railroad Company, and the plea *non est factum*, the plaintiff was endeavoring to prove that the * paper declared on bore the corporate seal of the Wil- [* 333] mington and Susquehannah Railroad Company. This being the fact to be proved, evidence that the corporation, though its counsel, had treated the instrument as bearing the corporate seal,

and relied upon it as a deed of the corporation, was undoubtedly admissible. It is objected that the parties to that suit were not the same as in this one; but this is wholly immaterial. The evidence does not derive its validity from any privity of parties. It tends to prove an admission by the corporation, that the instrument was sealed with its seal. It is further objected that the admission was not made by the defendants in this action, but by the Wilmington and Susquehannah Corporation. It is true the action in the trial of which the admission was made, being brought before the union of the corporations, was necessarily in the name of the original corporation; but as, by virtue of the act of union, the Wilmington and Susquehannah Company, the Baltimore and Port Deposit Company, and the Philadelphia, Wilmington, and Baltimore Company were merged in and constituted one body corporate, under the name of the Philadelphia, Wilmington, and Baltimore Railroad Company, is very clear that, at the time the trial took place in Cecil county court, all acts and admissions of the defendant in that case, though necessarily in the name of the Wilmington and Susquehannah Company, were done and made by the same corporation which now defends this action. This exception must, therefore, be overruled.

The third exception is, that the court permitted the deed to be read to the jury, although only vague and inconclusive evidence had been given that it bore the corporate seal. We do not consider the evidence was vague, for it applied to this particular paper, and tended to prove it to be the deed of the company. Whether it would turn out to be conclusive, or not, depended upon the fact whether any other evidence would be offered to control it, and upon the judgment of the jury. But the deed was rightly admitted to be read as soon as any evidence of its execution, fit to be weighed by the jury, had been given by the plaintiff. It was argued that this evidence was not sufficient to change the burden of proof; and it is true that, upon the issue whether the paper bore the corporate seal, the burden of proof remained on the plaintiff throughout the trial, however the evidence might preponderate, to the one side or the other; *Powers v. Russell*, 13 Pick. 69; but the court did not rule that the burden of proof was changed, but only that such *prima facie* evidence had been given as enabled the plaintiff to read the deed to the jury.

The subject-matter of the fourth exception became wholly immaterial in the progress of the cause, and could not be as-
[* 334] signed * for error, even if the ruling had been erroneous. *Greenleaf's Lessee v. Birth*, 5 Pet. 132. But we think the ruling was correct.

The fifth exception was taken to the refusal of the court to allow

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a question to be answered by James Canby, one of the defendant's witnesses. This witness had already testified as follows:—

“Leslie and White were the first contractors, and they were induced to relinquish it at the instance of the board, and it was then let to Sebre and Hiram Howard; the terms and price, and other essentials of the contract, were entered into on the 12th July, 1836; and on that day two papers were prepared, and were then signed by him, and also signed by Sebre Howard; and deponent, as president of the company, expressly directed the secretary, Mr. Brobson, that the seal of the company was not to be fixed to either paper, until Hiram Howard signed and sealed both of them. The two papers, respectively marked A and B, being shown to him, he stated that they are the two papers to which he refers; that the impression of the seal on said paper A, is the seal of the Wilmington and Susquehannah Railroad Company, but that said seal was not placed there, he is very positive, at any time whilst he was president of said company, and was never placed there by his authority or by the authority of the board.”

The defendant now insists he had a right to prove by this witness, that although the paper bore the corporate seal of the company, it was not its deed, because of an understanding between the witness and the plaintiff, that Hiram Howard was to execute the paper. If the offer had been to prove that, at the time the corporate seal was affixed, it was agreed the instrument should not be the deed of the company, unless, or until, Hiram Howard should execute it, the evidence might have been admissible. *Pawling et al. v. The United States*, 4 Cranch, 219; *Derby Canal Company v. Wilmot*, 9 East, 360; *Bell v. Ingestre*, 12 Ad. & El. n. s. 317. But the understanding, to which the question points, was prior to the sealing, and in no way connected with that act, of which the witness had no knowledge. It did not bear upon the question whether the instrument was the deed of the company, and was properly rejected.

The sixth exception rests on the following facts: The plaintiff offered to read the deposition of a deceased witness, taken by the defendants in the case in Cecil county court, to prove that the paper in question bore the seal of the corporation, placed there by the deponent, an officer of the corporation. The defendant objected, but the court admitted the evidence. We consider the evidence was admissible upon two grounds; to *prove that in that [* 335] case the defendant had asserted this instrument to be the deed of the corporation, and relied on it as such; and also, because the witness being dead, his deposition, regularly taken in a suit in which both the plaintiff and defendant were parties, touching the

same subject-matter in issue in this case, was competent evidence on its trial. It is said the parties were not the same. But it is not necessary they should be identical, and they were the same, except that Hiram Howard was a co-plaintiff in the former suit, and this diversity does not render the evidence inadmissible. 1 Greenl. Ev. 553; 1 Ad. & El. 19.

The 7th and last bill of exceptions covers nine distinct propositions given by the court to the jury as instructions. The first of the instructions excepted to, was as follows:—

“If the jury find from the evidence that this instrument of writing was produced in court, and relied upon by the present defendant as a contract under the seal of the Wilmington and Susquehannah Railroad Company, in an action of *assumpsit* brought by Sebre and Hiram Howard, against the last-mentioned company in Cecil county court, and that the said suit was decided against the plaintiffs upon the ground that this instrument was duly sealed by the said corporation as its deed, then the defendant cannot be permitted in this case to deny the validity of said sealing, because such a defence would impute to the present defendant itself a fraud upon the administration of justice in Cecil county court.”

It is objected that this instruction applied the doctrine of estoppel, where the matter of the estoppel had not been relied on in pleading. The rules on this subject are well settled. If a party has opportunity to plead an estoppel, and voluntarily omits to do so, and tenders or takes issue on the fact, he thus waives the estoppel, and commits the matter to the jury, who are to find the truth. 1 Saund. 325 a., n. 4; 2 B. & A. 668; 2 Bing. 377; 4 Bing. N. C. 748. But if he have not opportunity to show the estoppel by pleading, he may exhibit the matter thereof in evidence on the trial, under any issue which involves the fact, and both the court and the jury are bound thereby. 1 Salk. 276; 17 Mass. 369. Now the plea in this case was *non est factum*, which amounts to a denial that the instrument declared on was the defendant's deed at the time of action brought. If sealed and delivered, and subsequently altered or erased in a material part, or if the seal was torn off before action brought, the plea is supported. 5 Coke, 23, 119 b.; 11 Coke, 27, 28; Co. Lit. 35 b., n. 6, 7. It follows that a replication to the effect that on some day, long before action brought, the instrument was the deed of the defendant, would be bad on demurrer, for it would not completely answer the plea.

[*336] *The plaintiff cannot be said to have opportunity to plead an estoppel, and voluntarily to omit to do so, when the previous pleadings are such that, if he did plead it, it would be demurrable.

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Besides, a plea of *non est factum* rightly concludes to the country, and so the plaintiff has no opportunity to reply specially any new matter of fact. He can only join the issue tendered, and if he were prevented from having the benefit of an estoppel, because he has not pleaded it, it would follow that the plaintiff can never have the benefit of an estoppel when the defendant pleads the general issue, for in no such case can he plead it. This was clearly pointed out in *Trevivan v. Lawrence*, 1 Salk. 276, where the court say, "that when the plaintiffs' title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel." And it is in this way that the numerous cases of estoppels *in pais* which are in the recent books of reports, have almost always been presented.

It is further objected, that the facts supposed in the instruction did not amount in law to an estoppel. We think otherwise. *Hall v. White*, 3 C. & P. 137, was detinue for certain deeds. The defendant wrote to the plaintiffs' attorney, and spoke of the deed as in his possession under such circumstances as ought to have led him to understand a suit would be brought upon the faith of what he said. Best, C. J., ruled: "If the defendant said he had the deeds, and thereby induced the plaintiffs to bring their action against him, I shall hold that they may recover, though the assertion was a fraud on his part." In *Doe v. Lambly*, 2 Esp. 635, the defendant had informed the plaintiffs' agent that his tenancy commenced at Lady-day, and the agent gave a notice to quit on that day. This not being heeded, ejectment was brought, and the tenant set up a holding from a different day. But Lord Kenyon refused to allow him to show that he was even mistaken in his admission, for he was concluded. *Mordecai v. Oliver*, 3 Hawks, 479; *Crocket v. Lasbrook*, 5 T. B. Mon. 530; *Trustees of Congregation, &c. v. Williams*, 9 Wend. 147, are to the same point.

These decisions go much further than this case requires, because the defendant not only induced the plaintiff to bring this action, but defeated the action in Cecil county court, by asserting and maintaining this paper to be the deed of the company; and this brings the defendant within the principle of the common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss, and his own gain, he is guilty of a fraud; a fraud in fact, if he knows it to be false, fraud in law, if he does not know it to be true. *Polhill v. Walter*, 3 B. & Ad. 114; *Lobdell v. Baker*, 1 Met. 201.

*Certainly, it would not mitigate the fraud, if the false [*337] assertion were made in a court of justice and a meritorious suit defeated thereby. We are clearly of opinion, that the defendant cannot be heard to say, that what was asserted on the former trial was

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false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it. It does not carry the estoppel beyond what is strictly equitable, to hold that the representation which defeated one action on a point of form, should sustain another on a like point.

The next instruction is objected to on the ground that Hiram Howard ought to have been joined as a co-plaintiff. By reference to the indenture, it will be seen that it purports to be made between Sebre Howard and Hiram Howard, of the first part, and The Wilmington and Susquehannah Railroad Company, of the second part. The covenants are not by or with these persons *nominatim*, but throughout the party of the one part covenants with the party of the other part. Sebre Howard alone and the corporation sealed the deed.

It is settled that if one of two covenantees does not execute the instrument, he must join in the action, because whatever may be the beneficial interest of either, their legal interest is joint, and if each were to sue, the court could not know for which to give judgment. *Slingsby's case*, 5 Coke, 18, b.; *Petrie v. Bury*, 3 B. & C. 353. And the rule has recently been carried so far as to hold, that where a joint covenantee had no beneficial interest, did not seal the deed, and expressly disclaimed under seal, the other covenantee could not sue alone. *Wetherell v. Langston*, 1 Wels. H. & G. 634. But this rule has no application until it is ascertained that there is a joint covenantee, and this is to be determined in each case by examining the whole instrument. Looking at this deed, it appears the covenant sued on was with "the party of the first part," and the inquiry with whom the covenant was made, resolves itself into the question, what person, or persons, constituted "the party of the first part," at the moment when the deed took effect?

The descriptive words, in the premises of the deed, declare Sebre and Hiram Howard to be the party of the first part; but, inasmuch as Hiram did not seal the deed, he never in truth became a party to the instrument. He entered into no covenant contained in it. When, in the early part of the deed, the party of the first part covenants with the party of the second part to do the work, it is impossible to maintain, that Hiram Howard is there embraced, under the words "party of the first part," as a covenantor. And when, in the next [*338] sentence, the party of the *second part covenants with the party of the first part to pay for the work, it would be a most strained construction to hold, that the same words do embrace him as a covenantee. There can be no sound reason for the con-

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struction, that the words party of the first part mean one thing, when that party is to do something, and a different thing when that party is to receive compensation for doing it. The truth is, that the descriptive words are controlled by the decisive fact, that Hiram did not seal the deed, and so *error demonstrationis* plainly appears. An examination of the numerous authorities cited by the counsel for the plaintiff in error will show that they are reconcilable with this interpretation of the covenants; for, in all the cases in which one of the persons named in the deed did not seal, he was covenanted with *nominatim*. Our conclusion is, that the action was rightly brought by Sebre Howard alone.

The next instruction excepted to was as follows: "The omission of the plaintiffs to finish the work within the times mentioned in the contract, is not a bar to his recovery for the price of the work he actually performed; but the defendant may set off any damage he sustained by the delay, if the delay arose from the default of the plaintiffs."

The time fixed for the completion of the contract was the first day of November, 1836. The company agreed to pay twenty-six cents per cubic yard, in monthly payments, according to the measurement and valuation of the engineer. These monthly payments were made up to December, 1837; and when the contract was determined by the company, January 18, 1838, under a power to that effect in the instrument, which will be presently noticed, there remained due the price of the work done in December, and on eighteen days in January.

The question is, whether the covenant to pay was dependent on the covenant to finish the work by the first day of November. So far as respects each monthly instalment, earned before breach of the covenant to finish the work on the first day of November, it is clear the covenants were independent. Or, to state it more accurately, the covenant to pay at the end of each month, for the work done during that month, was dependent on the progress of the work, so far as respected the amount to be paid; but was not dependent on the covenant to finish the work by a day certain. The only doubt is, whether, after the breach of this last-mentioned covenant, the defendants were bound to pay for work done after that time.

There is an apparent, and perhaps some real conflict, in the decisions of different courts, on this point. 2 Johns. 272, 387; 10 *ibid.* 203; 2 H. Bl. 380; 8 Mass. 80; 15 *ibid.* 503; 5 Gill & Johns. 254. *We do not deem it needful to review the [*339] numerous authorities, because we hold the general principle to be clear, that covenants are to be considered dependent or in-

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dependent, according to the intention of the parties, which is to be deduced from the whole instrument; and in this case we find no difficulty in arriving at the conclusion, that the covenants were throughout independent. There are, in this instrument, no terms which import a condition, or expressly make one of these covenants in any particular dependent on the other. There is no necessary dependency between them, as the pay for work done may be made though the work be done after the day. The failure to perform on the day, does not go to the whole consideration of the contract, and there is no natural connection between the amount to be paid for work after the day, and the injury or loss inflicted by a failure to perform on the day. Still, it would have been competent for the parties to agree that the contractor should not receive the monthly instalment due in November, if the work should not be then finished, and that he should receive nothing for work done after that time.

But we find no such agreement. On the contrary, the covenant to pay for what shall have been done during each preceding month is absolute and unlimited, and the parties have provided a mode of securing the performance of the work and the indemnification of the company from loss, wholly different from making these covenants in any particular dependent on each other. They have agreed, as will be presently more fully stated, that the company may declare a forfeiture of the contract in case the work should not proceed to their satisfaction, and may retain fifteen per cent. of each payment to secure themselves from loss. Without undertaking to apply to this particular case any fixed technical rule, like that held in *Terry v. Duntze*, 2 H. Bl. 389, we hold it was not the intention of these parties, as shown by this instrument, to make the payment of any instalment dependent on the covenant to finish the work by the first day of November; and that consequently the instruction given at the trial was correct.

The sixth instruction, which is also excepted to, must be read in connection with the fifth and the provision of the contract to which they refer. The contract contains the following clause:—

“ Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then, and in such case, he shall be authorized to declare this contract forfeited, and thereupon the same shall become [* 340] null, and the party of the *first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right to except to or question the same in any place, under

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any circumstances whatever; but the party of the first part shall still remain liable to the party of the second part for the damages occasioned by the said non-compliance, irregularity, or negligence."

The instructions thereon were:—

5. "If the defendant annulled this contract, as stated in the testimony, under the belief that the plaintiff was not prosecuting the work with proper diligence, and for the reasons assigned in the resolution of the board, they are not liable for any damage the plaintiff may have sustained thereby, even although he was in no default, and the company acted in this respect under a mistaken opinion as to his conduct."

6. "But this annulling did not deprive him of any rights vested in him at that time, or make the covenant void *ab initio*, so as to deprive him of a remedy upon it for any money then due him for his work, or any damages he had then already sustained."

The law leans strongly against forfeiture, and it is incumbent on the party who seeks to enforce one, to show plainly his right to it. The language used in this contract is susceptible of two meanings. One is the literal meaning, for which the plaintiff in error contends, that the declaration of the company annulled the contract, destroying all rights which had become vested under it, so that if there was one of the monthly payments in arrear and justly due from the company to the contractor, and as to which the company was in default, yet it could not be recovered, because every obligation arising out of the contract was at an end.

Another interpretation is, that the contract, so far as it remained executory on the part of the contractor, and all obligations of the company dependent on the future execution by him of any part of the contract might be annulled. We cannot hesitate to fix on the latter as the true interpretation.

In the first place, the intent to have the obligation of the contractor, to respond for damages, continue, is clear. In the next place, though the contractor expressly releases all right to except to the forfeiture, he does not release any right already vested under the contract, by reason of its part performance, and *expressio unius exclusio alterius*. And finally, it is highly improbable, that the parties could have intended to put it in the power of the company to exempt itself from paying money, honestly earned and justly due, by its own act declaring a forfeiture. The counsel for the plaintiff in error seemed to feel the pressure of this difficulty, and not to be willing to maintain that *vested rights were absolutely destroyed [* 341] by the act of the company; and he suggested that though the covenant were destroyed, *assumpsit* might lie upon an implied

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promise. But if the intention of the parties was to put an end to all obligation on the part of the company arising from the covenant, there would remain nothing from which a promise could be implied; and if this was not their intention, then we come back to the very interpretation against which he contended; for if the obligation arising from the covenant remains, the covenant is not destroyed. We hold the instruction of the court on this point to have been correct.

The next instruction excepted to was in these words: "The increased work occasioned by changing the width of the road and altering the grade having been directed by the engineer of the company under its authority, was done under this covenant, and within its stipulations, and may be recovered in this action, without resorting to an action of *assumpsit*."

The covenant of the plaintiff was "to do, execute, and perform the work and labor in the said schedule mentioned." And the schedule mentions "all the grading of that part of section 9, &c., according to the directions of the engineer," &c. We think this instruction was correct. The plaintiff in error insists that the covenant was to do the grading precisely as shown by a profile made before the contract was entered into. If this were so, the company would have been disabled from making any change either of width or grade, without the consent of the defendant. We do not think this was the meaning of the contract, and both the company and the contractor having acted on a different interpretation of it, the company must now pay for the increased work of which they have had the benefit.

The ninth instruction was as follows:—

9. "Also, if from any cause, without the fault of the plaintiff, the earth excavated could not be used in the filling up and embankments on the road and at the river, it was the duty of the defendant to furnish a place to waste it. And if the company refused, on the application of the plaintiff to provide a convenient place for that purpose, he is entitled to recover such damages as he sustained by the refusal, if he sustained any; and he is also entitled to recover any damage he may have sustained by the delay of his work or the increase of his expense in performing it, occasioned [by] the negligence, acts, or default of the defendant."

To this the plaintiff in error objects, "that it assumes that the company was bound to provide a place on which to waste the earth."

The contract says the contractor is to place earth, not want-
[* 342] ed for embankment, "where ordered by the engineer." * He can rightfully place it nowhere until ordered by the engineer; and if such an order was refused, or delayed, and the contractor was thereby injured, he had a clear right to damages. It cannot be sup-

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posed such an order was to be given or obeyed, if obedience to it would be a trespass. Before giving it, the company was bound to make it a lawful order, the execution of which would not subject the parties to damages for a wrong, and therefore was bound to provide a place, and, of course, a reasonably convenient place as well as seasonably to give the order.

The plaintiff in error also excepted to the tenth instruction, which must be taken together with the clause of the contract to which it relates, to be intelligible. The contract contains the following provision :—

“ And provided, also, that in order to secure the faithful and punctual performance of the covenants above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this contract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands, until the completion of the contract, fifteen per cent. of the money at any time due to the said party of the first part; thus covenanted and agreed by the said parties, this twelfth day of July, 1836, as witness their seals.”

The instruction was :—

10. “Also, the plaintiff is entitled to recover the fifteen per cent. retained by the company, unless the jury find that the company has sustained damage by the default, negligence, or misconduct of the plaintiff. And if such damage has been sustained, but not to the amount of fifteen per cent., then the plaintiff is entitled to recover the balance, after deducting the amount of damage sustained by the company.”.

It is argued that here is a stipulation that the fifteen per cent. may be retained by the company until the completion of the contract by the defendant; that it never was completed by him, and so the time of payment had not arrived when this action was brought.

Now, it is manifest that one of the events contemplated in this clause was a forfeiture, such as actually took place; that in that event the contract never would be completed by the defendant, and so its completion could not with any propriety be fixed on as to the limit of time during which the company might retain the money, unless it was the intention of the parties that the fifteen per cent. so retained, should belong absolutely to the company in case of a forfeiture of the contract. But the parties have not only failed to provide for such forfeiture of the fifteen per cent., but [* 343] have plainly declared a different purpose. Their language is, that this money is retained, “ to indemnify and protect the party

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of the second part from loss, in case of default and forfeiture of this contract."

There is a wide difference, both in fact and in law, between indemnity and forfeiture; yet it is the former and not the latter which the parties had in view. Whether an express stipulation for a forfeiture of this fifteen per cent. could have been enforced, it is not necessary to decide.

But when the parties have shown an intent to provide a fund for indemnity merely, the legal, as well as the just result is, that after indemnity is made and the sole purpose of the fund fully executed, the residue of it shall go to the person to whom it equitably belongs. Rightly construed, the words, "until the completion of the contract," refer to the time during which all monthly payments were to be made, and give the right to retain the fifteen per cent. out of each and every payment, rather than fix an absolute limit of time during which these sums might be retained. In neither event, contemplated by this clause, would this limit of time be strictly proper. If a forfeiture of the contract took place, it was manifestly inapplicable; and if no forfeiture did take place, but damage were suffered by the company, from default of the contractor, equal to the fifteen per cent., it cannot be supposed their right to retain was to cease with the completion of the contract. This objection, therefore, must be overruled.

The plaintiff in error also excepts to the 12th instruction. We do not deem it needful to determine whether there was evidence to go to the jury, that the company did not use reasonable diligence to obtain a dissolution of the injunction, because we consider so much of the instruction as relates to this subject, to be a proper qualification of the absolute and peremptory bar, asserted in the first part of the instruction; and if the company desired to raise any question concerning the proper tribunal to decide on the matter of diligence, or respecting the evidence competent to justify a finding thereon, some prayer for particular instructions respecting these points should have been preferred. But we consider there was some evidence bearing on this question of diligence, and that it was for the jury and not the court to pass thereon.

Two objections are made to the thirteenth instruction. The first is, that this instruction assumed the existence of evidence, competent to go to jury, to prove that the defendants fraudulently terminated the contract under the clause which enabled them to declare it forfeited. To this objection, it is a conclusive answer that the defendants themselves prayed for an instruction substantially like that given. The other objection is, that the

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jury were instructed to allow by way of damages, such profit as they might find the plaintiff had been deprived of by the termination of the contract by the defendants, if they should find the act of termination to be fraudulent.

It is insisted that only actual damages, and not profits, were in that event to be inquired into and allowed by the jury. It must be admitted that actual damages were all that could lawfully be given in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that profits are not to be allowed, understanding, as we must, the term profits in this instruction as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam*.

And in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the other party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains, or speculations, or states of the market, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value, or cost. See *Masterton v. Mayor of Brooklyn*, 7 Hill, 61, and cases there referred to. We hold it to be a clear rule, that the gain or profit, of which the contractor was deprived, by the refusal of the company to allow him to proceed with, and complete the work, was a proper subject of damages.

We have considered all the exceptions; we find no one tenable, and the judgment of the court below is affirmed, with costs.

MARTIN VERY, Appellant, v. JONAS LEVY.

13 H. 345.

A creditor who has made a binding agreement with his debtor, not inequitable in itself, to accept specific articles in payment of his debt, cannot have relief in equity, without complying with his contract.

Such an agreement imports, *per se*, a valuable consideration.

If a clause in a power of attorney relate only to the particular mode in which an authority

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was to be executed, and its language is ambiguous, but, with reasonable attention would bear the interpretation upon which the agent and a third person have acted, the principal is bound.

THE case is stated in the opinion of the court.

Sebastian, for the appellant.

Lawrence, contra.

[* 356] * CURTIS, J., delivered the opinion of the court.

This is a suit in equity to foreclose a mortgage, commenced in the circuit court of the United States for the district of Arkansas. The bill alleges that on the 3d of March, 1841, the respondent, Levy, executed his writing obligatory, for the sum of four thousand dollars, bearing interest at the rate of seven per cent. per annum, payable to Darwin Lindsley in six years after its date, and secured the same by a mortgage on certain premises situated in the city of Little Rock; that by assignment from Lindsley, the complainant became the owner of this bond and mortgage on the 25th of March, 1841, and the bill prays for an account and foreclosure.

The answer of Levy admits the execution of a bond and mortgage, and their assignment to the complainant, and avers that on the 3d of March, 1843, he agreed with the complainant, through one John S. Davis, his agent, to deliver goods, such as jewelry, &c., in which the respondent dealt, at Little Rock, upon reasonable prices, in satisfaction of this bond and mortgage, within twelve months from the 3d of March, 1843; that in pursuance of that agreement

he did actually deliver on that day a part of the goods,

[* 357] agreed to be of the value of \$1,898.25, and * afterwards, on

the same day, the complainant, through his agent, Davis, signed and delivered to the respondent a memorandum in writing as follows : —

“ Little Rock, March 3, '43. I hereby agree to take in goods, such as jewelry, &c., the balance due me on a note assigned by D. Lindsley to me, as also a mortgage assigned by said Lindsley; said goods to be delivered to me, or my agent at Little Rock, Arkansas, at reasonable prices at said Little Rock; said goods to be called for within twelve months from this time. Martin Very. By J. S. Davis, attorney in fact.”

That in further pursuance of this agreement, the respondent kept in his hands and ready for delivery, and withdrawn from his trade, a sufficient amount of goods, such as are referred to in the memorandum, during the whole year which elapsed after the making of the agreement, and was constantly ready and willing to deliver the same

at Little Rock, but the complainant was not there, and did not authorize any one to receive them; that the respondent has ever since been ready and willing to perform his agreement, and offers to bring the goods into court, or place them in the hands of a receiver. The court below appointed a receiver, ascertained the amount of goods necessary to satisfy the unpaid residue of the bond, ordered the receiver, upon demand, to deliver the same to the complainant, in full satisfaction of the bond and mortgage, decreed the mortgage satisfied, and ordered the complainant to pay the costs. From this decree the complainant appealed.

An agreement by a creditor to receive specific articles in satisfaction of a money debt, is binding on his conscience; and if he ask the aid of a court of equity to enforce the payment, he can receive that aid only to compel satisfaction in the mode in which he has agreed to accept it. A court of equity will even go further; and in a proper case will enforce the execution of such an agreement. At law, a mere accord is not a defence; and before breach of a sealed instrument, there is a technical rule, which prevents such an instrument from being discharged, except by matter of as high a nature as the deed itself. *Alden v. Blague*, Cro. Jac. 99; *Kaye v. Waghorne*, 1 Taunt. 428; *Bayley v. Homan*, 3 Bing. N. C. 915. But no such difficulties exist in equity. On the broad principle that what has been agreed to be done, shall be considered as done, the court will treat the creditor as if he had acted conscientiously, and accepted in satisfaction what he had agreed to accept, and what it was his own fault only that he had not received. Indeed, even a court of law, in a case free from the technical difficulties above noticed, will do the same thing. *Bradly v. Gregory*, 2 Camp. 383.

* In order, however, to bring the case within these principles, [* 358] three things are necessary. An agreement, not inequitable in its terms and effect; a valuable consideration for such agreement; readiness to perform, and the absence of laches on the part of the debtor.

In this case the agreement was in writing, and one objection to it made by the complainant is, that the person who executed it on his behalf was not authorized to do so. The authority was in writing, and gave the attorney "full power and authority to trade, sell, and dispose of any notes, bills, bonds, or mortgages, held or owned by me, on any resident or residents of the State of Arkansas." Acting under this power, Davis did actually accept a partial payment in goods, amounting to \$1,898.25, and signed the memorandum in writing, which is relied on. The bond being produced, bears the following indorsement:—

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"Received on the within, in goods, the sum of eighteen hundred and ninety-eight dollars and twenty-five cents, March 3, 1843. Martin Very. By J. S. Davis."

The complainant, in his bill, treats this as a payment, and it does not appear that he made any objection to it, though Davis says, in one of his letters, he thought the prices were too high.

Upon this state of facts, we are of opinion Davis had authority to enter into the agreement in question. Besides the power to collect and sell, is the power to trade this bond and mortgage. It might be difficult to attach any general legal signification to this word. But considered in reference to the particular facts of this case, we think its meaning sufficiently clear.

It is proved by Davis, that the power, though general in its terms, was given solely in reference to this particular bond and mortgage. The bond had yet four years to run. When, therefore, Davis was authorized to collect this bond, the parties to the letter of attorney must have had in view some agreement respecting its extinguishment, which should vary its original terms of payment; and when he was further empowered to trade it, it is not an inadmissible interpretation that the new agreement for its extinguishment, which he was empowered to make, might be an agreement to receive specific articles in payment. It has been said that special powers are to be construed strictly. If by this is meant, that neither the agent, nor a third person dealing with him in that character, can claim under the power any authority which they had not a right to understand its language conveyed, and that the authority is not to be extended by mere general words beyond the object in view, the position is correct.

But if the words in question touch only the particular mode [* 359] in which an object, admitted to be within the * power, is to be effected, and they are ambiguous, and with a reasonable attention to them would bear the interpretation on which both the agent and a third person have acted, the principal is bound, although upon a more refined and critical examination, the court might be of opinion that a different construction would be more correct. *Le Roy v. Beard*, 8 How. 451; *Loraine v. Cartwright*, 3 Wash. C. C. R. 151; *De Tastett v. Crousillat*, 2 Wash. C. C. R. 132; 1 Liv. on Agency, 403, 404; *Story on Agency*, § 74. Such an instrument is generally to be construed, as a plain man, acquainted with the object in view, and attending reasonably to the language used, has in fact construed it. He is not bound to take the opinion of a lawyer concerning the meaning of a word not technical, and apparently employed in a popular sense. *Withington v. Herring*, 5 Bing. 456.

In this case, the complainant, besides empowering Davis to collect

a bond not yet payable, has authorized him to trade it,—a word frequently used in popular language to signify an exchange of one article for another, by way of barter.

This power was intended by the complainant to be acted on by the respondent, a jeweller, in the State of Arkansas, and we think he cannot complain that it was understood in its popular sense; more especially when he accepted, without objection, goods amounting to \$1,898.25, and gave the defendant no notice of his dissent from that construction of the power under which his agent received them, in part payment of the bond.

But it is insisted that, if Davis had authority to receive those goods in part payment, he had not power to enter into an executory agreement to receive the others. This might have presented a question of some difficulty, if the effect of that agreement had been to give a credit to the obligor, or to subject the principal to any risk, or place his claim in any less advantageous position than it would have been in if no contract had been made in reference thereto.

It must be borne in mind, that it is proved by Marcus Dotter and Emanuel Levy, and other witnesses, that the defendant had on hand more than sufficient goods, of the description mentioned, at the time the other goods were delivered and the memorandum signed. By the memorandum, the residue of the goods was to be delivered, at any time within twelve months, when called for by the complainant. The defendant was obliged to keep this amount of these goods constantly on hand, and ready for delivery. He could, therefore, gain nothing by delay. On the other hand, the complainant might have found it more convenient not to take all at one time; the bond bore interest, which was accruing by the delay; and if the defendant, * upon demand, should fail to comply, the bond would re- [* 360] main in force, and no right of the complainant to the money debt, or its security by the mortgage, would be prejudiced.

Under these circumstances, we are of opinion that, as Davis had authority to receive payment in goods, he had also authority to enter into this agreement, having the same object in view, and providing for its accomplishment in a way apparently more beneficial for the creditor than the receipt of all the goods at the time the arrangement was made.

That the agreement itself imports a consideration, deemed by the law valuable, there can be no doubt. An agreement to give a less sum for a greater, if the time of payment be anticipated, is binding; the reason being, as expressed in Pennell's case, 5 Co. R. 117, that peradventure parcel of the sum, before the day, would be more beneficial than the whole sum on the day. Coke's Lit. 212, b; Com.

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Dig. Accord, B. 2; *Brooks v. White*, 2 Met. 283. And when the time of payment is not anticipated, the law deems the delivery of specific articles a good satisfaction of a money debt, because it will intend them to be more valuable than the money to the creditor who has consented to the arrangement. Bac. Ab. Accord, A; *Pennel's case*, 5 Co. R. 117; *Booth v. Smith*, 3 Wend. 66; *Kellogg v. Richards*, 14 Wend. 116; *Steinman v. Magnus*, 11 East. 390; *Lewis v. Jones*, 4 B. & C. 513.

In this case, both these rules apply; for the time of payment was to be anticipated, and specific articles delivered.

We consider it also clearly proved, that the defendant has been ready to perform at all times since the agreement was made. It is said by Davis that, in 1844, January, he thinks, he addressed a letter to Levy, requesting him to pay the money coming to Very in jewelry, watches, &c.; and also requested him to put them up, and deliver them to Mr. Waring, in Little Rock; and that Levy declined paying as requested. That he has seached for Levy's letter, but cannot find it.

It is certainly highly improbable that Levy, who had had these goods on hand, and set apart from his trade, ready for delivery, ever after the agreement was made, should have thus refused to deliver them.

He produces a letter of Davis, which, though it bears date on the 3d of February, 1844, is undoubtedly the letter Davis speaks of, and is as follows:—

“New Albany, February 3, 1844. Dear sir: If you can pay the balance of your note in good silver or gold watches, and good jewelry, at fair prices, say about half of each, or two thirds watches, you will please notify me of the fact by return mail, and I will [*361] send on for them at once. The things you let me *have before were too high, at least Mr. Very says so. Let me hear from you. I am, your friend. John S. Davis. Mr. J. Levy.”

It thus appears, Davis was mistaken in supposing he designated a person in Little Rock to receive the goods; and unless it was the purpose of this letter to vary the original understanding of the parties in respect to the proportion of watches to be delivered, it is difficult to see what fair object it could have had. The testimony of Davis that Levy refused, without undertaking to state the contents of Levy's letter, or the substance of its contents, cannot be deemed sufficient to prove a refusal by Levy to perform his contract. Before the defendant can be prejudiced by testimony of a refusal, it is reasonable the court should know what it was. It certainly was not a refusal to deliver the goods to Waring, as Davis says, for Waring was not

mentioned by Davis in his letter. The conduct of Davis in this matter is somewhat strange. He made the memorandum in writing as Very's agent, agreeing to accept payment of the balance of the bond in these articles; he delivered to Very the jewelry received, but says he did not tell Very of the contract to receive the balance in goods; and eleven months afterwards he wrote the letter of the 3d of February, which seems to be a new proposal, as if no contract had yet been made on the subject; he mistakes the contents of his own letter in a material particular, says he has lost Levy's letter, but the latter declined paying as requested. We are not satisfied that a breach of contract by Levy, or any laches on his part, is made out.

It is asserted by the complainant's counsel that the contract was void on account of Levy's fraud; that it was obtained from Davis by false statements and the suppression of material facts by Levy, and, of course, cannot be the basis of any right in a court of equity.

But this ground is not open to the complainant. No fraud is charged in the bill, and though the complainant may not have anticipated, when the bill was filed, that this contract would be set up in the answer as a defence, yet on the coming in of the answer he might have amended his bill, as he did in another particular, averring that if any such agreement was in fact made, it was void, and charging in what the fraud consisted. Not having done so, he cannot now avail himself of it. Besides, the evidence comes in a very irregular way, and is wholly unsatisfactory. It is brought out by Davis, in answer to interrogatories which do not call for any statements touching such subjects, but relate to wholly different matters. Thus the 19th interrogatory inquires: "For what reason was the agreement, marked *B, given or executed, if ever executed?" [* 362] To this Davis replies: "That said agreement was executed and delivered for several reasons: The first of which reasons was, that Levy represented that he had expended large sums of money in defending suits for the benefit of Very, and for the purpose of saving Very from losing the money for which this suit is brought; the second reason was, that said Levy represented himself as insolvent or wholly unable to pay the debt due Very; and thirdly, that the property mortgaged was of little value, and would only pay at best a very small portion of the money intended to be secured by the mortgage; all which statements and representation thus made by said Levy, said Davis, subsequent to the signing and delivering said agreement, found to be false."

The 20th interrogatory inquires: "What was the inducement and consideration for giving and executing the said agreement B?" To this he answers: "That the inducement and consideration for giving

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and executing agreement "B" were the false representations of said Levy of his circumstances, the value of the property mortgaged, and that he, said Levy, had paid large sums of money to save said debt secured by said mortgage for said Very; these statements and representations were made before and at the time said agreement "B" was executed and delivered, and said Davis then believed them to be true, but subsequently found them to be false."

This is all the testimony in support of the charge of fraud. What he means, when he says he subsequently found the representations to be false, he does not explain. That he had any personal knowledge of their falsehood he does not say; and his statement indicates only that, by subsequent inquiry, and the information elicited thereby, he became satisfied that he was deceived. It would not be in conformity with settled rules of pleading and evidence in courts of equity, to convict a party of a fraud, not charged on the record, and brought out for the first time by the voluntary statements of a witness in answer to no question, and resting at last upon mere hearsay.

The decree of the circuit court is affirmed, with costs.

19 H. 126.

HORACE H. DAY, Plaintiff in Error, v. W. JAMES WOODWORTH and others.

13 H. 363.

The right to open and close is so far dependent on the discretion of the court below, that it is not the subject of a bill of exceptions.

In an action of trespass, a jury may give what are called exemplary damages; but counsel fees are not to be included in, and allowed as part of the damages, in any action at law.

ERROR to the circuit court of the United States for the district of Massachusetts. The case is stated in the opinion of the court.

Gillet, for the defendants.

No counsel *contra*.

[* 369] * GRIER, J., delivered the opinion of the court.

The plaintiff in error was plaintiff below in an action of trespass, charging the defendants with tearing down and destroying his mill-dam. The defendants pleaded in justification that the Berkshire Woollen Company owned mills above the dam of plaintiff, who illegally erected and maintained the same, so as to injure the mills above; that by direction of said company, and as their agents and servants, they did enter plaintiff's close, and did break down and demolish so much of the plaintiff's dam as was necessary to remove

the nuisance and injury to the mills above, and no more, and as they lawfully might. To this plea the plaintiff replied *de injuria, &c.*

*On the trial of this issue, the defendants "claimed the [* 370] right to begin and offer their evidence first, and open and close the argument. The plaintiff claimed the same right. The court ruled in favor of the defendants, to which the plaintiff excepted." This ruling of the court is now alleged as error.

Our attention has been pointed to numerous decisions of English and American courts on this subject, which we think it unnecessary to notice more particularly, than to state, that the question whether a defendant in trespass who pleads a plea in justification only, has a right to begin and conclude, has been differently decided in different courts. It is a question of practice only, and depends on the peculiar rules of practice which the court may adopt. The English courts have regretted that an objection to the ruling of the court at *nisi prius* on this question should ever have been permitted to be received as a ground for a new trial. But although a court may sometimes grant a new trial where the judge has not accorded to a party certain rights to which, by the rules of practice of the court, he may be justly entitled, we are of opinion that the ruling of the court below on such a point is not the proper subject of a bill of exceptions or a writ of error. A question as to the order in which counsel shall address the jury does not affect the merits of the controversy. As a matter of practice, the circuit court of Massachusetts had a right to make its own rules. The record does not show that the rule of the court is different from their judgment on this occasion. So that the plaintiff has failed to show any error in the decision, assuming it to be a proper subject of exception.

The great question, on the trial of this case, appears to have been whether the plaintiff's dam was higher than he had a right to maintain it, and if so, whether the defendants had torn down more of it, or made it lower than they had a right to do.

The plaintiff's counsel requested the court to instruct the jury that "they might allow counsel-fees, &c., if there was any excess in taking down more of the dam than was justifiable, and give as a reason that the defendants thereby became trespassers *ab initio*."

The court instructed the jury "that if they should find for the plaintiff on the first ground, namely, that the defendants had taken down more of the dam than was necessary to relieve the mills above, unless such excess was wanton and malicious, then the jury would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess, but not any thing for counsel-fees or extra compensation to engineers."

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[* 371] * This instruction of the court is excepted to, on two grounds. First, because "this being an action of trespass, the plaintiff was not limited to actual damages proved," and, secondly, that the jury, under the conditions stated in the charge, should have been instructed to include in their verdict for the plaintiff, not only the actual damages suffered, but his counsel-fees and other expenses incurred in prosecuting his suit.

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called "smart money." This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.

This doctrine about the right of the jury to include in their verdict, in certain cases, a sum sufficient to indemnify the plaintiff

* for counsel fees and other real or supposed expenses over [* 372] and above taxed costs, seems to have been borrowed from the civil law and the practice of the courts of admiralty. At first, by the common law, no costs were awarded to either party, *eo nomine*. If the plaintiff failed to recover, he was amerced *pro falso clamore*. If he recovered judgment, the defendant was *in misericordia* for his unjust detention of the plaintiff's debt, and was not, therefore, punished with the *expensa litis* under that title. But this being considered a great hardship, the statute of Gloucester, 6 Ed. I. c. 1, was passed, which gave costs in all cases when the plaintiff recovered damages. This was the origin of costs *de incremento*; for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause. See Bac. Abr. tit. Costs.

Under the provisions of this statute, every court of common law has an established system of costs, which are allowed to the successful party by way of amends for his expense and trouble in prosecuting his suit. It is true, no doubt, and is especially so in this country, (where the legislatures of the different States have so much reduced attorneys' fee bills, and refused to allow the *honorarium* paid to counsel to be exacted from the losing party,) that the legal taxed costs are far below the real expenses incurred by the litigant; yet it is all the law allows as *expensa litis*. If the jury may, "if they see fit," allow counsel fees and expenses as a part of the actual damages incurred by the plaintiff, and then the court add legal costs *de incremento*, the defendants may be truly said to be *in misericordia*, being at the mercy both of court and jury. Neither the common law, nor the statute law of any State, so far as we are informed, has invested the jury with this power or privilege. It has been sometimes exercised by the permission of courts, but its results have not been such as to recommend it for general adoption either by courts or legislatures.

The only instance where this power of increasing the "actual damages" is given by statute is in the patent laws of the United States. But there it is given to the court and not to the jury. The jury must find the "actual damages" incurred by the plaintiff at the time his suit was brought; and if, in the opinion of the court, the defendant has not acted in good faith, or has been stubbornly litigious, or has caused unnecessary expense and trouble to the plaintiff, the court may increase the amount of the verdict, to the extent of trebling it. But this penalty cannot, and ought not to be twice inflicted; first, at the discretion of the jury, and again at the discretion of the court. The expenses of the defendant over and above taxed

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[* 373] costs are usually *as great as those of plaintiff; and yet neither court nor jury can compensate him, if the verdict and judgment be in his favor, or amerce the plaintiff *pro falso clamore* beyond tax costs. Where such a rule of law exists allowing the jury to find costs *de incremento* in the shape of counsel fees, or that equally indefinite and unknown quantity denominated (in the plaintiff's prayer for instruction) "&c.," they should be permitted to do the same for the defendant, where he succeeds in his defence, otherwise the parties are not suffered to contend in an equal field. Besides, in actions of debt, covenant, and *assumpsit*, where the plaintiff always recovers his actual damages, he can recover but legal costs as compensation for his expenditure in the suit, and as punishment of defendant for his unjust detention of the debt; and it is a moral offence of no higher order, to refuse to pay the price of a patent or the damages for a trespass, which is not wilful or malicious, than to refuse the payment of a just debt. There is no reason, therefore, why the law should give the plaintiff such an advantage over the defendant in one case, and refuse it in the other. See *Barnard v. Poor*, 21 Pick. 382; and *Lincoln v. The Saratoga Railroad*, 23 Wend. 435.

We are of opinion, therefore, that the instruction given by the court in answer to the prayer of the plaintiff, was correct.

The instruction to the jury, also, was clearly proper as respected the measure of the damages, and that the jury had nothing to do with the question, whether their verdict would carry costs. The judgment is, therefore, affirmed.

21 H. 202; 23 H. 2.

JOSEPH FOWLER, JUNIOR, Appellant, v. NATHAN HART.

13 H. 373.

Where the district court, sitting in bankruptcy, reformed a first mortgage without notice to the second mortgagee, and subsequently, on the petition of the assignee, and with notice to the second mortgagee, caused the mortgaged property to be sold, *held*, that the second mortgagee was bound by this last proceeding, and could not maintain a bill against the first mortgagee, who was the purchaser under the sale, to charge his second mortgage on the property.

THE case is stated in the opinion of the court.

Bradley, for the appellant.

No counsel *contra*.

[* 377] * M'LEAN, J., delivered the opinion of the court.

This is an appeal from the circuit court of the United States for the eastern district of Louisiana.

Fowler filed his bill in the third district court of New Orleans, representing that on the 16th December, 1839, he recovered a judgment in the commercial court of New Orleans, against Daniel T. Walden and William Christy for \$3,530.22, besides interest; that on the 29th December, 1839, he caused the judgment to be duly inscribed in the office of the recorder of mortgages for the parish of New Orleans, by which the same became a judicial mortgage on the real estate of the defendants in the parish; that Walden afterwards became bankrupt, and * Christy was appointed his [* 378] assignee; and that he procured an entry of cancellation to be made by the recorder of judicial mortgages without his consent, and illegally; that the mortgage remains in force.

And the plaintiff states that when the judgment was recorded, and up to the time of the bankruptcy of Walden, he was the owner and in possession of a certain lot of ground and buildings thereon in the city of New Orleans, to wit, in the second municipality, in the square bounded by New Levee, St. Joseph, Commerce, and Julia streets, measuring twenty-three feet five inches front on New Levee street, by about 125 feet six inches in depth on the side nearest St. Joseph street, 124 feet seven inches in depth on the side nearest Julia street, and about twenty-one feet eight inches on the rear line; which property is liable to the judicial mortgage of the petitioner; that Christy, the assignee of Walden, sold the same lot to one Nathan Hart, of New York, who took possession thereof, and still remains in possession; that he well knew, at the time of his purchase, that the petitioner's mortgage was a lien on the same, and that Christy, the assignee, had no power to cancel the same. And the petitioner avers that his judgment lien was good under the second section of the bankrupt law.¹

On the application of Hart, he being a citizen of New York, the suit was removed from the state court to the circuit court of the United States.

In his answer, Hart denies that the petitioner has a mortgage on the property described in his petition; and states that he purchased the same for the sum of \$4,700, under a sale of the marshal, on 16th June, 1845, in pursuance of a decree of the United States district court, entered the 23d May, 1845, sitting as a court of bankruptcy, in the matter of the bankruptcy of Daniel T. Walden, and confirmed according to law by a sale duly recorded from Christy, the assignee, before a notary public, the 19th June, 1845; and clear of all mortgages, the same having been cancelled, by order of the judgment of

¹ 5 Stata. at Large, 442.

said court, the 23d May, 1845, on a rule, notice of which was duly served on petitioner.

The mortgage of the defendant, Hart, on the above property was dated 22d May, 1838, the judicial mortgage of the petitioner took effect the 29th December, 1839. But after the bankruptcy of Walden, and before the sale of the property to Hart by the assignee, it was discovered that there was a mistake in the mortgage in describing the property intended to be mortgaged. To correct this mistake, a bill was filed by Hart against Christy, the assignee, and on the 5th December, 1844, a decree was obtained correcting the mortgage, so as to describe the lot intended to be mortgaged. Of this proceeding the petitioner, Fowler, seems to have had no notice.

[* 379] * Afterwards, on the 24th April, 1845, the assignee petitioned the district court, stating "that there is still in his possession, as assignee, the following described property, specially mortgaged to Nathan Hart to secure the payment of the sum of \$8,655, with interest, which he prays may be sold on certain terms named. The lot above described is stated, and also other property of the bankrupt. The court ordered that due notice of the petition be published in two newspapers printed in the district, ten days at least before the time assigned for the hearing, and that the petition be heard on the 23d May ensuing.

On the 10th May, 1845, the following rule was entered by the court: "The assignee of the said estate having filed in this court a petition as above described, it is ordered by the court that a hearing of the said petition be had on Friday the 23d May next, at 10 o'clock A. M., when, as one of the mortgage creditors of said estate, you are notified to appear and show cause why the property, as described below, should not be sold upon the terms and in the manner and form set forth in said petition, and why the said assignee should not be authorized to erase and cancel the mortgages, judgments, and liens recorded against said bankrupt, and in favor of certain creditors of the estate, affecting the property surrendered, so that said assignee may convey a clear and unincumbered title to any purchaser thereof, reserving to such creditors all their rights in law to the proceeds of the sale of the said property upon the final distribution thereof."

To this rule was appended the following, with other descriptions of property ordered to be sold. 1. "Property in the second municipality, bounded by New Levee, Commerce, St. Joseph, and Julia streets, with the improvements thereon, mortgaged to Nathan Hart. Terms, one third cash, the balance on a credit of twelve and eighteen months."

To the property above designated No. 1, the name of Joseph

Fowler was appended, and the marshal returned "that he had received the same on the 12th May, 1845, and on the same day served a copy of the rule on the within named Joseph Fowler."

The principal objection to the validity of the sale of the property to Hart is founded on the procedure in the district court, for the correction of the misdescription of the mortgage. As between the mortgagor and mortgagee, there can be no objection to this proceeding. The district court had jurisdiction of the matter, and it is but the ordinary exercise of the powers of a court of chancery to reform a mortgage or other instrument so as to effectuate the intention of the parties. But it is alleged that Walden having become a bankrupt, his property was vested in his assignee for the benefit of his creditors, and that the judicial mortgage of the [*380] petitioner could not be affected by a procedure in which the petitioner was not a party, and of which he had no notice.

The assignee generally represents the creditors, and being made a party to the proceeding on the mortgage, he appeared and denied the allegations of the petition of the mortgagee; but on the hearing, the district court was satisfied of the truth of the allegations in the bill, and reformed the mortgage so as to describe truly the property intended to be mortgaged. It is true that Fowler, the petitioner, was not a party to this proceeding, and if the action of the district judge had here terminated, it would be difficult to maintain the decree.

By the 11th section of the bankrupt law, the court had power to order the assignee to redeem and discharge "any mortgage or other pledge or deposit, or lien upon any property," &c. It also necessarily had the power, on the sale of mortgaged premises, to distribute the proceeds as the law required. And in regard to the property in question, it appears that due notice was given to Fowler of the application for the sale of it by Hart, who claimed to have a special mortgage on it; and the property was substantially described, and the day stated on which the court would act on the application. And in addition, a notice was published in two newspapers ten days before the time set for hearing by the court. The object of this notice was stated to be, to make an unembarrassed title to the purchaser, and enable Fowler to make any objections he might have to the sale, and the cancelment of his mortgage. That the rights of creditors were reserved as to the proceeds of the mortgaged premises on a final distribution.

Whether the petitioner, Fowler, took any steps under this notice, does not appear; and in the absence of such evidence, it may well be presumed that he acquiesced in the procedure. The notice afforded him an opportunity to assert his rights, and to object to the

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decree for the reform of Hart's mortgage, of which he now complains, as fully as if he had been made a party to that proceeding. This he could have stated as an objection to the sale of the premises, or in claiming the proceeds of that sale. The reform of the mortgage by the court could not have estopped him from the assertion of his rights, as he was not a party to that proceeding of the court. But, having neglected to assert his rights on the above occasion, it is now too late to set them up against the purchaser of the property at the sale.

Although there is some discrepancy in the description of the property contained in the notice from that in the decree reforming the mortgage, yet substantially it is believed to embrace the [* 381] * same property; and as the notice was served upon the petitioner, as having a mortgage on the property, we think it was sufficient. The decree of the circuit court is affirmed, with costs.

JOHN H. HOWARD, Plaintiff in Error, v. STEPHEN M. INGERSOLL;
JOHN H. HOWARD and JOSEPHUS ECKOLLS, Plaintiffs in Error, v.
STEPHEN M. INGERSOLL.

13 H. 381.

Construction of an act of commissioners establishing part of the western boundary of Georgia on the west bank of the Chattahoochee River.

The first-mentioned case came here upon a writ of error to the supreme court of Alabama. The second, on a writ of error to the circuit court of the United States for the district of Georgia. The question in both was concerning the boundary line between the States of Georgia and Alabama; the plaintiffs in error claiming under Georgia, and the defendants under grants from the United States, as of the territory of Alabama.

The instructions given in the courts below and the questions raised, and the facts and documents upon which they depend, are stated in the opinion of the court.

Johnson and Berrien, for the plaintiff.

Coze, contra.

[* 397] * WAYNE, J., delivered the opinion of the court.

The point for decision in these cases is one of boundary, between the States of Georgia and Alabama. It is, what is the line of Georgia on the western bank of the Chattahoochee River, from the 31st degree north latitude, "where the same crosses the boundary line between the United States and Spain; running thence up the said River Chattahoochee, and along the western bank thereof, to the great bend thereof, next above the place where a certain

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creek or river called 'Uchee,' (being the first considerable stream on the western side, above the Cussetas and Coweta towns,) empties into the said Chattahoochee River."

Its determination depends upon what were the limits of Georgia, and her ownership of the whole country within them, when that State, in compliance with the obligation imposed upon it by the revolutionary war, conveyed to the United States her unsettled territory; and upon the terms used to define the boundaries of that cession.

In the case from Alabama, "the court charged the jury, that one passing from Georgia to Alabama, across the Chattahoochee River, at ordinary low water, would be upon the bank as soon as he left the water on the western side, although an inappreciable distance from the water, and that the line described in the treaty of cession from Georgia to the United States, as running *up [* 398] said river and along the western bank thereof, is the line impressed upon the land by ordinary low water; and if they believed the plaintiff's mill was west of that line, and the defendant's dam backed the water so as to obstruct the operation of the mill, the plaintiff was entitled to recover."

In the case from the circuit court of the United States for the district of Georgia, the district judge presiding, the jury was instructed "that by the true construction of these articles of cession, the boundary line between the State of Georgia and Alabama was to be drawn on and along the western bank of the Chattahoochee River, at low-water mark, when the river was at its lowest state."

All of us think that both of these instructions were erroneous, though there is a difference among us as to the construction given by the majority of the court to the article defining the boundary of Georgia upon the river, and the reasoning in support of it. These differences will be seen in the opinions which our brothers have said they meant to give in these cases.

We will now give our views of what were the limits of the State of Georgia when it ceded its unsettled territory west of the Chattahoochee River to the United States; that State's then ownership of the whole of it, citing in support of our conclusions indisputable historical facts, and the legislation of Georgia, of South Carolina, and of the United States, upon the subject.

It is well known to all of us, when the colonies dissolved their connection with the mother country by the declaration of independence, that it was understood by all of them, that each did so with the limits which belonged to it as a colony. There was within the limits of several of them a large extent of unsettled territory. Other States had little or none.

The latter contended, as all of them had united in a common declaration of independence, and in a common war to secure it, which no one colony could do for itself, that the unsettled lands within the former ought to become a common property among all of the States.

On the 6th of September, 1780, congress recommended this subject to the consideration of the States. On the 10th of October after, it was resolved by congress "that the unappropriated lands that may be ceded or relinquished to the United States by any State, should be disposed of for the common benefit of the United States; and be settled and formed into distinct republican States, which shall become members of the federal union, and have the same rights of sovereignty, freedom, and independence, as the other States." 3 Journals of Congress, 516, 535.

From these references, we have the whole policy of congress concerning those unsettled territories, so happily, since, consummated by the States and by congress. It was not, however, achieved without some delays and objections from the States to which these lands belonged. Some of the States, Maryland taking the lead, refused to sign the articles of confederation until after strong assurances had been given, that such cessions would be made. And when that State did so, it was with the declaration that she did not relinquish or intend to relinquish the right which she had with the other States to the "back country," as she termed the unsettled lands within the limits of some of the States.

Early in 1781, Virginia made such a relinquishment. New York quickly followed, and Massachusetts and Connecticut, always willing to make any sacrifice for the common cause, relinquished their unsettled lands after the war had been concluded.

The cause assigned by each of these four States for doing so, and the principles upon which these cessions were accepted by the United States, involved North and South Carolina and Georgia in the obligation to do the same. Though not done for several years, it was never denied by either of these States.

All of the States had been actuated by the same spirit for independence. When the war had been happily concluded, all of them looked to the wild territory within the United States, as the first source from which revenue could be raised to pay the war debt of the Union. It then was \$42,000,000.

It would be difficult to say which class of its creditors had the strongest claims upon the justice and gratitude of the people of the United States. But all felt, and it was conceded by the other classes of creditors, that the soldiers who had patiently borne the privations

of the field, and bravely met its hazards to secure the liberties of the country, ought to have their claims paid by portions of the public lands, with certain available securities from congress for the residue.

From these references, we learn that the States entered into the Union, with the understanding by all of them that each had an undiminished sovereignty within its colonial limits. That there were within the limits of some of them unsettled lands over which congress had no legislative control. But that it was early recognized by these States whilst the articles of confederation were in the course of ratification, and immediately after they were completed, that their unsettled territories were to be transferred by them to the United States, to be disposed of for the common benefit, and to be formed into distinct republican States, with all the rights and sovereignty of the other States.

We have seen that relinquishments had been made by Virginia, New York, Massachusetts, and Connecticut. South Carolina did the same in 1787, after the settlement of her territorial disputes with Georgia.

* We will now state what those disputes were, and how [* 400] they were adjusted, in order that the jurisdiction of the State of Georgia, and that State's ownership of the whole territory ceded by it to the United States in 1802, may be fully understood, in connection with the principles or rules by which its western boundary upon the Chattahoochee River must be interpreted.

Georgia was originally a province, formed by royal prerogative, out of a portion of that territory which was within the chartered limits of South Carolina. It was a corporation under the title of "Trustees for establishing the colony of Georgia in America, which was to continue for twenty-one years, with power in the trustees to form laws and regulations for its government, after which all the rights of soil and jurisdiction were to vest in the crown."

It was described in the act of incorporation, "as all those lands, countries, and territories, situate, lying, and being in that part of South Carolina in America, which lies from the northern stream of a river, then commonly called the Savannah, all along the seacoast to the southward under the most southern stream of a certain other great water or river, called the Alatomaha, and westward from the heads of the said rivers respectively in direct lines to the south seas."

It may be well here to say, that the power of the king to alter, change, enlarge, or diminish the limits of his royal governments in America, cannot be denied. "Those governments were of two kinds, royal and proprietary. In the former, the right of the soil and jurisdiction remained in the crown, and their boundaries, though described

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in letters-patent, were subject to alteration at its pleasure; for, as it possessed the right of soil and government, and delegated them to its governors during pleasure, it might dispose of them in what manner and to whom it thought fit, might alter, extend, or abridge them as its inclination or policy might declare. In proprietary governments, the right of soil as well as jurisdiction was vested in the proprietors. These charters were in the nature of grants, and their limits being fixed by these charters, could not be altered but by their consent."

South Carolina, then, could not object either to the first charter given to Georgia, or to the subsequent extension of its boundaries by the king, though forming a part of what had been within the charter of that royal colony.

In 1763, Great Britain having then acquired, by treaty with Spain, Florida, Pensacola, and all that Spain had held in North America, east and southeast of the River Mississippi; all of that country between the Alatomaha and Florida, originally within the [* 401] chartered limits of South Carolina, but which had * always been disputable territory between England and Spain, the then governor of South Carolina assumed to be at his disposal under his royal commission. Within the year 1763, he granted to many persons in Carolina large tracts of land, lying between the Alatomaha and St. Mary's rivers. His power to do so was objected to by Georgia, but her remonstrances were not regarded. The subject was brought to the notice of the board of trade. The governor's conduct was disapproved, declared to be unwarrantable, and orders were given that no charters or grants should be issued for lands on the south of the Alatomaha River, which had been surveyed under warrants from South Carolina. But as surveys had been made under the governor's warrants, and grants issued by South Carolina for the lands, before the orders of the board of trade were received, they were not formally recalled. These transactions, however, excited much attention at the time in England, from the representations which were made, concerning them, by Governor Wright, of Georgia. The ultimate consequence was, that the king, in January, 1764, extended the limits of Georgia, including within them all that country which had been within the chartered limits of South Carolina, and limiting the south boundary of that colony by the northern stream of Savannah River, so far as the head of the same. The language of the letters-patent, granted to Sir James Wright, is, that the colony of Georgia shall be bounded on the north by the most northern stream of a river, then commonly called Savannah, as far as the head of the said river; and from thence westward as far as our territories extend; on the east by the seacoast, from the said River Savannah, to the

most southern stream of a certain other river, called St. Mary's, including all islands within twenty leagues of the coast lying between the said rivers Savannah and St. Mary's, as far as the head thereof; and from thence westward as far as our territories extend by the north boundary line of our provinces of East and West Florida," which was "a line drawn from that part of the Mississippi which is intersected by latitude 31, due east, to the Appalachicola." See the king's proclamation and letters-patent to Sir James Wright, Wat. 744.

For twenty years after this extension of Georgia, its limits were not called in question by South Carolina, or, perhaps, to speak more properly, they had not been a subject of inquiry by that State, though what they were, was well understood by the authorities of Georgia. Nothing had occurred between 1764 and 1776, from which any contest concerning them could arise, and it was not until two years after the provisional treaty of peace¹ between England and the United States was made, that South Carolina claimed any part of the unsettled territory of *Georgia, within the limits defined [* 402] by the king's patent of January, 1764.

The provisional treaty of peace with the king of Great Britain was signed in November, 1782. In the 2d article will be found the boundaries of the United States. They are repeated in the definitive treaty concluded at Paris on the 3d September, 1783.² In less than four months after the provisional treaty was made, Georgia declared, legislatively, that the southern boundary of the State was a line drawn from the Mississippi in the latitude of 31 degrees, on a due east course to the River Chattahoochee, and in other respects according to the southern boundary of the United States, as that was settled by the provisional treaty between the United States and Great Britain. The southern boundary of the United States is described, in the treaties with England, "as a line to be drawn, due east, from the middle of the Mississippi River, in the latitude of 31 degrees north of the equator, to the middle of the River Appalachicola or Chattahoochee, thence along the middle thereof, to its junction with the Flint, thence straight to the head of the St. Mary's River, and thence down along that river to the Atlantic ocean." Compare this boundary with that in the commission to Governor Wright, for the colony of Georgia, and they will be found identical. Indeed, unless the chartered limits of Georgia, as they are stated in that commission, had been taken by the negotiators of the treaty with England as their guide, they would not have had any by which to run the southern line for the United States from the Mississippi to

¹ 8 Stats. at Large, 54.² Ib. 80.

the Chattahoochee, and thence as it is described to the Atlantic Ocean.

The next action of Georgia, asserting its jurisdiction over its limits, will be found in the 13th section of the act of February, 1783, Wat. Dig. 264. It defines what those limits were. In February, 1785, Georgia passed another act for the establishment of a county to the west of the Chattahoochee, within a line to be drawn down the Mississippi from where it receives the Yazoo, till it intersects the 31st degree of north latitude, thence due east as far as the lands might be found to reach, which had at any time been relinquished by the Indians, then along the line of relinquishment to the River Yazoo and down to its mouth, calling it the county of Bourbon.

This last act, and the two which preceded it, attracted the notice of the authorities of South Carolina, and then that State, for the first time since 1764, denied that the limits of Georgia were as she had declared them to be, and claimed for itself within them a large extent of country.

South Carolina reasserted her claim upon the principle that her surveys had been made in 1763, between the rivers Alata-
[* 403] maha * and St. Mary's, forgetting that her then governor had been reproved and had apologized for authorizing them to be made, and denied that the source of the Keowee River was the head of the Savannah River, and that the country between its source and the source of the Tugaloo River down to the mouth of the Keowee, where it empties into the Savannah, belonged to Georgia.

Neither State would yield, and the border excitements, growing out of the differences, admonished both that it would be best and safest to resort to that court which had been provided in the 9th article in the confederation for "the settlement of disputes then existing or that might arise between two or more States concerning boundary, jurisdiction, or any other cause whatever."

South Carolina presented a petition for that purpose. Georgia was cited to appear, and did so. Congress then provided for the appointment of judges, and at this point of the proceedings, Carolina withdrew her petition, it having become the conviction of both States, from information brought out by the controversy, that these differences could be amicably adjusted.

Carolina had contended that as the original boundaries of Georgia were the rivers Savannah and Alatomaha, and lines drawn due west from their sources to the Mississippi; that all the land lying south of the Alatomaha, and a line drawn due west from its source to the Mississippi, as far as the northern boundary of the Floridas, continued to be a part of the province of South Carolina, out of which Georgia

was taken. And that when the British crown, by its proclamation of October, 1763, annexed to Georgia all the lands lying between the rivers Alatomaha and St. Mary's, it meant only the lands between those rivers below their sources, and not such as lay above those sources, and between lines drawn from them respectively west to the Mississippi; which tract of country, of course, even after the proclamation, still continued a part of South Carolina.

Georgia, on the contrary, maintained, that when the proclamation annexed to its government all the lands lying between the rivers Alatomaha and St. Mary's, it meant not merely the tract of country which lay between those rivers, below their sources, but also the whole territory held by the British crown, between the northern boundaries of Florida, as established by the same proclamation, and the ancient line of Georgia.

Carolina further claimed the land lying between the North Carolina line and the line due west from the mouth of the Tugaloo River to the Mississippi, because the River Savannah loses that name at the confluence of the Tugaloo and Keowee rivers, and consequently that spot was said to be the head of Savannah River. Georgia contended that the source of the Keowee was the head of the Savannah River.

* At this time, neither State had such original documents [* 404] from the archives of England as were sufficient to determine its right with certainty. But Georgia had secondary proof of the letters-patent which were given by the king to Governor Wright, in 1764, though they had been taken away with him when he fled from the State during the revolutionary war. The original commission and letters-patent were subsequently obtained from the records of the board of trade in England. They fully confirmed the correctness of the secondary proof upon which the State had acted. There was also, at the same time, disclosed from those records, in detail, all of the action of the board of trade and of the king, concerning Governor's Boone's surveys in 1763, of the land between the Alatomaha and St. Mary's, with the disapprobation of all that he had done in that matter, and the governor's apology for his conduct. Though done already, we will introduce into this connection the boundaries of Georgia in the letters-patent to Governor Wright, that the controversy between Georgia and South Carolina, and its amicable termination, may be better understood.

After South Carolina withdrew her petition from congress, the said States entered into a convention for the settlement of the territorial differences between them. It was concluded at Beaufort, in April, 1787. Carolina was represented by three of her most distin-

guished citizens of that day, and Georgia by three of hers, in whom the State had every confidence. It was ratified by both States, though one of the three commissioners from Georgia, Mr. Houston, was dissatisfied with, and would not sign it.

By this convention, it was agreed, "that the most northern branch or stream of the River Savannah, from the sea or mouth of such stream to the fork or confluence of the river now called Tugaloo and Keowee, and from thence the most northern branch or stream of the said River Tugaloo, till it intersects the northern boundary line of South Carolina, if the said branch or stream of Tugaloo extends so far north, reserving all the islands in the said River Tugaloo and Savannah to Georgia; but if the head spring or source of any branch or stream of the said River Tugaloo does not extend to the north boundary line of South Carolina, then a west line to the Mississippi to be drawn from the head spring or source of the said branch or stream of Tugaloo River, which extends to the highest northern latitude, shall forever hereafter form the separation limit and boundary between the States of South Carolina and Georgia." 1 Art. Convention, Wat. Dig. 754.

From this article, we see that South Carolina abandoned the ground taken in her petition, and only claimed territory in [* 405] Georgia, *in the event that a geographical fact should turn out differently from what the commissioners of Georgia said it was, and accordingly with what the commissioners of South Carolina supposed it to be. That was, whether or not the head spring or source of any branch or stream of Tugaloo extended to the north boundary line of South Carolina. If it did not, then from wherever the head spring or source of that river might be lower than this north boundary line, Carolina could claim from it by a line drawn west to the Mississippi, all the land which was between that line and the higher north line which Georgia had before declared to be the boundary of this State. But if the head spring or source of the Tugaloo did reach the north boundary line of South Carolina, then that stream to its source was to be the boundary between the two States, to the west of which Carolina could not then claim any land. Georgia, on its part, by the same article, withdrew its claim to that part of South Carolina which is between the Keowee and Tugaloo rivers, where the most northern branch of the Tugaloo intersects the northern boundary line of South Carolina.

South Carolina, however, acting upon the opinion of its commissioners, that the head spring of the most northern branch of the Tugaloo did not intersect the northern boundary line of that State, ceded to the United States, in three months after the convention with Geor-

gia had been made, all the territory which it was supposed Carolina had got by it in Georgia.

The cession is as follows: "All the territory or tract of country included within the River Mississippi, and a line beginning at that part of said river which is intersected by the southern boundary line of the State of North Carolina, and continuing along the said boundary line until it intersects the ridge or chain of mountains which divides the eastern from the western waters, then to be continued along the top of the said ridge of mountains until it intersects a line to be drawn due west from the head of the southern branch of Tugaloo River to the said mountains, and thence to run a due west course to the River Mississippi.

The United States accepted the cession, and until by actual exploration it had been ascertained that the head spring or branch of the Tugaloo River was north of the line of South Carolina, it was not known that the land actually transferred to the United States by the South Carolina cession was only a tract of country about twelve miles wide from north to south, extending from the top of the main ridge of mountains which divides the eastern from the western waters, lying between latitude 35° N., the southern boundary of North Carolina, and the northern boundary of Georgia, as settled by the convention between * Georgia and South Carolina in 1787; and [* 406] that by that convention it was established that South Carolina had no unsettled territory to the west of the top of that ridge.

It was, however, a transfer of all the claim of South Carolina to unsettled land. North Carolina afterwards ceded to the United States its western lands. Georgia was the only remaining State which had not done so.

The termination of her differences with South Carolina placed Georgia, as to its limits, accordingly with that State's declaration of them in 1783, or as they had been given by the king in his commission to Governor Wright in 1764, and as they had been used by the United States for the treaties of peace with England, and afterwards in its negotiations with his Catholic majesty from 1793 to 1795, which resulted in the treaty of that year¹ with the latter.

It may as well be mentioned here, however, that in the course of that negotiation, Spain contended that the boundary of West Florida was at the junction of the Yazoo with the Mississippi, in latitude $32^{\circ} 39'$, running from that point east to the Chattahoochee River. The claim was founded upon certain proceedings of the king of Great Britain between the years 1763 and 1767, extending the northern boundary of West Florida from 31° north to the mouth of the Ya-

¹ 8 Stats. at Large, 138.

zoo, within two months after the commission had been given to Governor Wright, in which 31° north, or the north boundary line of our provinces of East and West Florida "were declared to be the southern boundary of Georgia. These proceedings were an application to the king in 1764 by the board of trade for an extension of the boundaries of West Florida, and commissions given by the king in 1767 and 1770 to governors Elliot and Chester, by which they were made captains general and governors of West Florida, bounded to the southward by the Gulf of Mexico, including all its lands within six leagues of the coast, from the River Appalachicola to Lake Pontchartrain; to the westward by the said lake, the Lake Maurepas, and the River Mississippi; to the northward by a line drawn due east from the mouth of the Yazoo River, where it unites with the Mississippi, due east to the Appalachicola." This pretension upon the part of Spain was considered as altogether inadmissible by our negotiators, on the ground that the United States commissioners and those of the king of England, in making the treaties of 1782 and 1783, had taken the boundaries of East and West Florida as laid down in the proclamation of the king of England dated the 7th October, 1763, as the true boundaries of those provinces when they were finally confirmed to Spain in 1783. And further, that Spain could not rightfully dispute

[* 407] it or *attempt to extend her boundary to the north of 31 degrees, because she had been substantially a party to all the negotiations which resulted in a peace between herself and England, and between England and the United States, with a full knowledge by the Spanish negotiators that the boundaries between England and the United States had been fixed in the line of 31 degrees from the Mississippi to the Appalachicola or Chattahoochee. Spain conceded it.

After the treaty had been made, however, it was suggested, as the treaties with England had been made with the United States, and not with the State of Georgia, that the former might claim the territory between 31 degrees north and the line from the Yazoo to the Chattahoochee, upon the ground that the king had extended Florida to the latter, or limited Georgia to that line after he had declared the southern line of Georgia was to be the northern line of Florida. But the United States did not at any time assert such a claim. It could not well have been done upon principle, after the United States had rejected those papers as giving any ground of claim to Spain, and had insisted on the negotiation upon the southern boundary of the United States as defined in the treaty of peace with England upon the ground that it had been from 1763 the boundary of Georgia. It may not be amiss, however, to notice as a historical fact, the objections which were made against the availableness of these docu-

ments for the extension of the boundary of Florida to the Yazoo when they were first produced. No patent could be found from the king under the great seal of Great Britain for such a purpose. There was no record of such a grant in the board of trade, nor in any other of the archives of England concerning her possessions in America. It could not be found in the archives of Florida. Without such a patent, or a proclamation in the nature of a patent, for such a purpose, no colonial claim for territory was complete.

Such was and has been the uniform basis of colonial limits; and it is somewhat remarkable that in no instance besides of English colonial grant, is the king's patent wanting. In this instance the extension is vested exclusively upon two commissions to two governors of West Florida, one three years after the petition from the board of trade, to Governor Elliott in 1767, and the other to Governor Chester in 1770. In the first, there is a recital of the boundaries of West Florida, when Governor Johnstone received his commission in 1763, followed by this declaration, that the king had recited, by letters-patent under the great seal of Great Britain, his grant of boundaries for Florida as to its northern line of 31° from the Mississippi to the Chattahoochee and extended them to the Yazoo, by a line drawn from * it on the Mississippi to [* 408] the Appalachicola. The same boundary was given in the commission to Governor Chester. There is no doubt that governors Elliott and Chester permitted settlements and gave grants for land within the limits of these commissions from their dates until Florida became, in 1783, by a retrocession from England, again a part of the dominions of his Catholic majesty. From these circumstances, a patent from the king for the enlargement of Florida was presumed. It was not unreasonable that it should be. But it was not considered by the United States that its operation could set aside the previous grant to the colony of Georgia of the same territory, as the king, in his treaties with the United States, had recognized the line of the latter as the boundary of Florida, and that it had been accepted in that character by the United States as its southern boundary. In fact, admitting that the king's patent had been given, his treaty with the United States was a revocation of it, and Spain could not claim from its treaty with England any right to the extension, that having been a political act of the king of England for the benefit of his own subjects, when, by his proclamation of 1763, Florida, as it had been acquired from Spain, was for the first time erected into the two distinct governments of East and West Florida.

It appears, from what has been said, that the limits of Georgia, after the settlement of her territorial dispute with South Carolina,

were not questioned; in other words, that they had been rightly asserted in the act of 1783, and that such portion of the State, afterwards designated as the Mississippi territory, was within its acknowledged boundary. Georgia became then for the first time in a condition to transfer to the United States its unsettled territory. In less than a year after the last appeal from congress to the State to do so, her delegates in congress were authorized to make a cession of a part of it. The beginning of it was at the middle of the Chatahoochee, where it is intersected by the thirty-first degree of north latitude; thence due north one hundred and forty British statute miles; thence due west to the middle of the River Mississippi; thence down the middle of the river where it intersects the thirty-first degree of north latitude; thence along the said degree to the beginning. The quantity offered, and the conditions upon which it was to be ceded, were objected to by the United States. It was particularly unacceptable to congress, because such a cession left a larger portion of unsettled territory within the State undisposed of, and interfered with the original obligation and intention of congress to establish in the unsettled territories which might be relinquished by the States to the United States, other States, to become a part of the Union upon an entire equality with the rest.

[* 409] * Congress refused to accept the cession tendered, at the same time offering to accept from Georgia all her territorial claims west of the River Appalachicola, or west of a meridian line running through or near the point where that river intersects the thirty-first degree of north latitude. Georgia, in turn, refused the proposal of the United States, and thenceforward maintained her jurisdiction within her limits, until a cession was made of her unsettled territory to the United States in 1802. In 1789, an act was passed by the State, reserving to certain persons and companies preëmption rights to her lands. In 1795, by another act, in which the territorial jurisdiction of the State was reasserted, Georgia granted and transferred, for valuable considerations, to several companies, all of her territory bordering westwardly on the Mississippi River, in distinct tracts. Among others, a tract comprehending a part of what was subsequently declared by congress to be the Mississippi territory. The prices for some of these alienations were paid into the treasury of the State, and patents for them were issued by the governor. At the next session, however, of the general assembly, the act of 1795 was declared to be void on account of the fraud, bribery, and corruption by which it had been passed. But the companies to which Georgia had conveyed, had sold part of the land to innocent purchasers before the revoking act was passed. They ap-

pealed to congress to maintain them in their rights, as well against any future claim of Georgia, as against any claim that the United States might make to the land which had been conveyed by Georgia. Unfavorable at first as these sales by Georgia were to a transfer of its unsettled territory to the United States for the common benefit of all the States, they contributed to that result afterward. The action of the State had involved it in difficulties of a very uncertain termination in a legal point of view. It had just been released from an unpleasant litigation, (American State Papers, Public Lands, Vol. I. p. 167. *Moultrie et al. v. The State of Georgia*, not reported,) growing out of an act passed by the State in 1789, conveying lands between the Mississippi and Tombigbee rivers to the Virginia, South Carolina, and Tennessee Yazoo companies, by the 11th amendment of the constitution, by which the States were declared not to be suable in the courts of the United States by citizens of another State or by citizens or subjects of a foreign state. This, however, did not conclude the rights of the parties in favor of the State to the lands which the State had contracted to convey to them. The right of the State, too, to large bodies of land within the Yazoo and its southern boundary, was doubtful on account of grants from Spain before it had ceded Florida to England; from England, also, on account of such as *had been made under the au- [* 410] thority of the governors of West Florida; and by Spain again after the retrocession of the territory to it by England in 1783. But the greatest difficulty in the way of the State continuing to hold its unsettled territory, was that the Indian title had only been extinguished to about three millions of acres out of fifty millions. At one time the Indians were not inclined to sell; the State was not in a pecuniary condition to buy them out. The Indians were formidable in tribes and numbers. Their habitations and their hunting-grounds covered the larger part of the State. Its white population was then small, and too scattered for warlike concentration against Indian hostilities or their casual incursions into the white settlements for plunder. They were masters of the forest, and intervened all over the State between the white settlements, so that no one of them could have intercourse or give aid to another without a license to pass through their hunting-grounds or at the risk of attempting it without permission. On the other hand, white men in numbers, no longer under the influence of social life, or caring nothing for its restraints, hovered constantly on the borders of the Indians, exasperating them by depredations, and misleading them into all the excesses of a corrupt civilization, or into feuds with each other or forays against the whites. Each day was an anticipation of attack, and

when the night came, repose was only taken with the rifle ready to repel it. In this condition of things, and without any efficient power in the State to make a change, it became necessary for the United States to use its constitutional right to give relief. That was not so much a matter of choice as it was of obligation. Constitutionally they could alone regulate commerce with the Indian tribes. Constitutionally they had the power to make war; their obligation was to bear its expenses and defend the States against it in whatever way it might happen; and constitutionally congress was bound to guard against war, to prepare for and prevent, it from whatever quarter it might be likely to come. The recent treaty, too, with Spain, bound that nation and the United States to restrain the Indian tribes, in the territories of each, from war among themselves and from such as might lead to aggressions upon the territories of either nation. Added to such considerations, the people who had settled to the west of the Chattahoochee, between it and the Yazoo River, claimed from the United States the protection which Georgia could not give, and they asked for a securer and more definite political organization than they had had either under English or Spanish rule, or from Georgia legislation.

Nine years had gone by since the failure of the last attempt to obtain it, without any thing having been substantially done [* 411] * by Georgia to transfer to the United States its unsettled territory, in compliance with the resolution of congress of 1780. All the other States had done so. It was not likely at the time, that it would be done for some years yet. Under such circumstances, congress still thinking that the United States had, under the cession of South Carolina, a right to territory in Georgia, passed the act of the 7th April, 1798,¹ for the amicable settlement of limits with the State of Georgia, and authorizing the establishment of a government in the Mississippi territory. It was done with an express recognition of Georgia's right of soil and jurisdiction in the territory. Section 6 of the act. This, however, did not satisfy that State, and she remonstrated to congress against it. But the political necessity under which congress had been called upon to act, soon became obvious to all, and to none more than to the people and the legislature of Georgia. It is not necessary to give an account of all that passed from that time to the transfer of the territory to the United States. Three of Georgia's most distinguished citizens were appointed commissioners to negotiate with three others of national reputation upon the part of the United States for a cession, and happily that was done in 1802, which had been so long delayed; — thus

¹ 1 Stats. at Large, 549.

consummating that great policy of our early national existence, from which so many States have been added to the Union.

From the account which has been given of the territorial claims of Georgia, and her legislation concerning them, with that of South Carolina denying them, and the final adjustment of the dispute between these States and that of the United States for the cession by Georgia of her unsettled territory, we have learned that when Georgia did cede it to the United States, that she was then in possession, and had a right to all the land, subject to the Indian title, which that State had declared to be within her limits, except so much as there was between the Tugaloo and Keowee rivers, which Georgia had ceded to South Carolina by the convention of 1787. We further learn that the adjustment with South Carolina, left in Georgia the Chattahoochee River from its source to the 31st degree of north latitude, as Georgia had claimed her limits to be, since the king's patent to Sir James Wright, in 1764.

In other words, that the Chattahoochee, from its source to that point, was at all times after that patent within Georgia with the right of soil and jurisdiction when its unsettled territory was ceded to the United States. This fact being so, it gives us a key from the laws of nations to aid us in the interpretation of its cession as to the boundary between Georgia and Alabama, which must prevail, as it would in all other cases, *where there may be [*412] a transfer by one nation of a part of its territory to another, with a river for its boundary, without an express stipulation for the relinquishment of the rights of soil and jurisdiction over the bed of such river.

The rule *jure gentium*, to which we refer, is not now for the first time under the consideration of this court. We are relieved, then, from its discussion, by citations from Vattel and other writers upon the laws of nations, to show what it is ; but it will be found in the 22d chapter of Vattel. Among the writers after him it is not controverted by any one of them. Besides, it is according to what had been anciently the practice of nations, substantiated by an adherence to it down to our own times. In *Handley's Lessee v. Anthony*, 5 Wheat. 379, this court said, by its organ, Chief Justice Marshall, "when a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention about it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants territory on the one side only, it retains the river within its domain, and the newly-created State extends to the river only." The river, however, is its boundary.

Georgia was certainly the original proprietor of the River Chattahoochee to 31 degrees north, when her territory west of it was ceded to the United States, and that cession must be understood to have been made under the rule, unless by terms in her grant to the United States it was taken out of it, with the view to give to the new State which was to be formed out of the cession, a coequality of soil and jurisdiction in the river which was to separate them. In the interpretation of the boundary which Georgia retained for itself upon the Chattahoochee, it must be kept in mind that the cession was made in contemplation of a new State to be formed with the Chattahoochee as a part of its boundary. National considerations then entered into the spirit of the transfer with which its eminent negotiators on both sides were familiar.¹ If we disregard them now, and permit ourselves to view this question in the narrower limits of verbal definitions, and upon the principles upon which private rights were adjusted on rivers, between proprietors of land on either side of them, we should do so forgetting all the circumstances and objects for which the cession was made, the parties to it, and the new party that was to be brought out of it as an independent State.

But we will now examine the article in the cession for [*413] the *boundary of Georgia upon the Chattahoochee, for we think its terms are coincident with the principle of national law, under which we have put this question.

We give the article entire, intending, after it has been done, to use it with direct reference to the cases in hand as to the question of boundary on the Chattahoochee River, between the States of Georgia and Alabama, as that question was raised in the courts below.

"The State of Georgia cedes to the United States all the right, title, and claim, which the said State has to the jurisdiction and soil of all the lands situated within the boundaries of the United States, south of the State of Tennessee, and west of a line beginning on the western bank of the Chattahoochee River, where the same crosses the boundary line between the United States and Spain, running thence up the said River Chattahoochee and along the western bank thereof, to the great bend thereof, next above the place where a certain creek or river called Uchee, (being the first considerable stream on the western side above the Cussetas and Coweta towns,) empties into the said Chattahoochee River; thence in a direct line to Nica-jack, on the Tennessee River; thence crossing the said last-mentioned river, and thence running up the said Tennessee River, and along

¹ The commissioners on the part of the United States were Mr. Madison, Mr. Gallatin, and Mr. Lincoln. Those on the part of Georgia were James Jackson, Abraham Baldwin, and John Milledge.

the western bank thereof to the southern boundary line of the State of Tennessee."

The plaintiff in error derives his title to the land which he claims from the State of Georgia, and his right to construct a dam across the Chattahoochee to the point where it terminates on the western bank under that title and the convention by which Georgia ceded her unsettled territory to the United States. He claims that his land runs across, from the eastern bank of the Chattahoochee to the bank on the western side. The defendant in error claims under a patent from the United States to himself to fractional section 11, township 7, range 30, and proved title to himself to lots 1, 2, 3, 4, in the town of Gerard, in Russell county, Alabama, specifically described, in some of said counts of his declaration, as land having for its eastern boundary the State of Georgia, and is immediately west of the Chattahoochee River, on the bank thereof.

In the first case, No. 121, it was ruled by the court below, that the line established by the articles of cession was the line impressed by ordinary low water. In the case from the circuit court of the United States for the district of Georgia, the judge instructed the jury that the line was to be drawn on and along the western bank of the Chattahoochee River at low-water mark, when the river was at its lowest state.

From the bill of exceptions, in the first case, it appears that "immediately at the plaintiff's lands and lots, the [*414] banks of the river are from fifteen to twenty feet high on both sides, abrupt above and below for considerable distances. The high banks, however, do not extend down to the water's edge at ordinary low water. The bed of the river at this point is about two hundred yards wide from bank to bank; by the bed is meant the space between these abrupt and high banks; and is composed of rocks and slues among the rocks from one side to the other. Ordinary low water and extreme low water together prevail for about two thirds of the year, during which time the river is confined to a channel about thirty yards wide, leaving the bed of the river as above described, exposed on each side of this channel from thirty to sixty yards. Immediately under the western abrupt and high bank, and within the latitude of the north and south boundary line of plaintiff's land, those lines being drawn down to the water's edge, and in the bed of the river, as above described, east of the western abrupt and high bank, the plaintiff erected a mill previous to 1842, and continued in the possession and use of it until overflowed by defendant's dam. The place on which the mill is, is covered with water in ordinary high water, but is bare and dry in ordinary low water."

"To supply his mill with water, the plaintiff had erected a cross-dam, which ran in a northeast direction into the river, and supplied his mill with water at all seasons, by diverting a portion of the stream to the mill, which passed again into the river above the defendant's dam; and the plaintiff had blown out a rock to give room to his mill to work."

The evidence in the case, from the circuit court of Georgia, in respect to the situation of the plaintiff's mill and the description of the river, is substantially the same.

It appears from it, that the mill of the plaintiff, by his own showing, is in the bed of the river, to the east of the abrupt bank, by the prolongation of his north and south boundary line from the bank, which he claims a right to prolong, from his being the owner of the land to the bank of the river, as a riparian right.

Upon this evidence, the court in Alabama charged the jury, that one passing from Georgia to Alabama, across the Chattahoochee River at ordinary low water, would be upon the bank as soon as he left the water on the western side, although an inappreciable distance from the water, and that the line described in the treaty of cession from Georgia to the United States, as running up said river, and along the western bank thereof, is the line impressed upon the land by ordinary low water; and if they believed plaintiff's [*415] mill was west of that *line, and defendant's dam backed the water so as to obstruct the operation of the mill, the plaintiff was entitled to recover. The defendant in this case excepted to the charge, and asked the court to instruct the jury, if the bank of the river was ordinary low-water mark, that the plaintiff had no right to the use of the water at that stage, which the court refused to give. In the case from the United States circuit court, the defendants below (plaintiffs in error here) prayed the court to instruct the jury, that the true interpretation of the article of cession requires the boundary line between Georgia and Alabama to be drawn on and along the western bank of the Chattahoochee River; and that, wherever the jury might find that bank to be, the jurisdiction and limits of Alabama must terminate, and cannot pass to the eastward of the same; but that all east of such line, whether it be land or water, is included within the limits and jurisdiction of Georgia; and no grant, from the United States or the State of Alabama, can confer title to any part of the same, either directly or indirectly, by virtue of such grant, or as an incident to the same. This prayer was refused; and the court instructed the jury that the boundary line between the States of Georgia and Alabama was to be drawn on and along the western bank of the river, at low-water mark, when the river was at its lowest stage.

In our view, the words of the cession have the same meaning in law that they have in common parlance. They are not at all uncertain, if taken connectively, as to the locality intended for the western line of Georgia on the Chattahoochee. Separate the word bank from "on and along the bank," and consider it only in connection with the other words, "running up the river," and it might be inferred that the water of the river, at some stage of it, was to be the boundary, and that those owning the land on either side were riparian proprietors, *usque ad flum aquæ*. But not so when they are considered together, as we will presently show.

When the commissioners used the words bank and river, they did so in the popular sense of both. When banks of rivers were spoken of, those boundaries were meant which contain their waters at their highest flow, and in that condition they make what is called the bed of the river. They knew that rivers have banks, shores, water, and a bed, and that the outer line on the bed of a river, on either side of it, may be distinguished upon every stage of its water, high or low; at its highest or lowest current. It neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered *with water, may be used for cattle to range upon, as natural [* 416] or uninclosed pasture. But it may include spots lower than the bluff or bank, whether there is or is not a growth upon them, not forming a part of that land which, whether low or high, we know to be upland or fast lowland, if such spots are within the bed of the river. Such a line may be found upon every river, from its source to its mouth. It requires no scientific exploration to find or mark it out. The eye traces it in going either up or down a river, in any stage of water. With such an understanding of what a river is, as a whole, from its parts, there is no difficulty in fixing the boundary line in question. Wherever that outer bed-line shall be, from its beginning on the bank, at the 31st degree of north latitude, to the mouth of the Uchee, on the western side, is the western boundary of Georgia on the bank and along the bank running up the River Chattahoochee.

If the language of the article had been, "beginning on the western bank of the Chattahoochee, and running thence up the river," and no more had been said, the middle thread of the river ordinarily, and without any reference to the fact that Georgia was the proprietor of the river, it would have been said to be the dividing line between the two States. But there is added, "running up the said River Chattahoochee and along the western bank thereof." This last controls any uncertainty there may be; for if the first call or object to locate the

line is the bank of the river, it is plain that the western limit of Georgia on and along the bank of the river, must be where the bank and the water meet in its bed within the natural channel or passage of the river. The words "along the bank," added to the words, "on the bank," distinguish this case from all those in which courts have had the greatest difficulty where a line was to be fixed when it is on the bank without a call for the stream or along the river, or up or down the river. Angell, 19. Along the bank, is strong and definite enough to exclude the idea that any part of the river or its bed was not to be within the State of Georgia. It controls any legal implication of a contrary character. Such a line, too, satisfies the calls on and along the bank in the navigable and unnavigable parts of the river. In the former, Alabama has all the uses of the river, including the use of the western bank for navigation and commerce, which the State of Georgia can claim. In that part of the river not navigable, Georgia has both soil and jurisdiction for all such purposes as are implied by both, and the stream or water of the river for all such purposes as it may be used in any stage of the water.

Such a line may be made certain on every part of the river, whatever may be the changes on the western bank from wash-
[* 417] ings, * the abrasions of extraordinary floods, or from any of those sudden causes which in nature change the beds of rivers. In such cases, the proprietors would continue to hold according to the original boundaries of their grants. We repeat, "along the bank thereof," is the controlling call in the interpretation of the cession. It excludes the idea that a line was to be traced at the edge of the water as that may be at one or another time or at low water, or the lowest low water. Water is not a call in the description of the boundary, though the river is, and that, as we have shown, does not mean water alone, but banks, shores, water, and the bed of the river. If water, as one of the river's parts, had been meant, it would have been so expressed.

The call is for the bank, the fast land which confines the water of the river in its channel or bed in its whole width, that is to be the line. The bank or the slope from the bluff or perpendicular of the bank may not be reached by the water for two thirds of the year; still, the water line impressed upon the bank above the slope is the line required by the commissioners, and the shore of the river, though left dry for any time, and but occasionally covered by water in any stage of it to the bank, was retained by Georgia as the river up to that line. Wherever it may be found, it is a part of the State of Georgia, and not a part of Alabama. Both bank and bed are to be ascertained by inspection, and the line is where the action of the

water has permanently marked itself upon the soil. Wherever that line may be, is to be determined in each trial at law by the jury upon proofs, the jury being instructed by the court that the bed of the river, wherever that may be, belongs to Georgia, whether it extends at certain points to the face of the bank, where, from the perennial flow of the water there is no margin, or to other points where there is.

We must reject, altogether, the attempt to trace the line by either ordinary low water or low water. These terms are only predicable of those parts of rivers within the ebb and flow of the tides, to distinguish the water line at spring or neap tides. Such a difference is uniform twice within every month of the year, and because it is so it is termed ordinary. In that part of a river in which there is no ebb and flow, the changes in the current are irregular and occasional, without fixed quantity or time of recurrence, except as they are periodical with the wet and dry seasons of the year. And low water is the furthest receding point of ebb tide. Nor do we think that the interpretation of this article is aided by any cases upon the rights of riparian proprietors. Such rights depend upon calls in grants for land either from sovereignties having an equal right in the stream to the thread of the river, or from grants from a State having the entire ownership of a river. In this instance, two [*418] sovereignties were dealing for a cession of country from one to the other, with a river as a boundary between them to be marked on that bank of it from which the ceded land was to commence. Now, as between them, there were no antecedent calls upon the river to raise the question of riparian rights. But, on the contrary, the river at the time formed a part of what was Georgia, and the commissioners negotiated upon the footing, that though the United States had formed the Mississippi territory, it was done with the disclaimer in terms, that it in no way whatever should affect either the rights of sovereignty or soil which Georgia had in the territory. Moreover, we do not think that the commissioners could have contemplated that the State of Georgia and the United States were to have a divided or equal sovereignty in the river, or that the United States was to retain any right of soil in the same, when we find the commissioners in terms calling for the boundary line between Spain and the United States in the middle of the Chattahoochee, and then transferring the western line of Georgia to the western bank of it.

If the running water of the river had been intended to be the line, and that the United States and Georgia were to have an equal right of soil and sovereignty in the bed of the river, on the western bank, why was it that the middle of the river at latitude 31 degrees north, was

abandoned for the western bank? The only answer which can be given is, that Georgia meant to retain the river to the western bank, and that the United States conceded it. Again, the extension of the line from the middle of the river at that point to the bank, necessarily excludes that the water of the river, at any stage less than that which covers the bed of it, was to be any guide for the line.

* We think that the instructions given by the courts below were erroneous.

Our interpretation of the first article of the cession made by Georgia to the United States is, that the western line of Georgia upon the Chattahoochee River, from its beginning in the 31st degree of north latitude to the great bend thereof, next above the place where a certain creek or river called Uchee, (being the first considerable stream on the western side, above the Cussetas and Coweta towns,) empties into the said Chattahoochee River, is a line to run up the river on and along its western bank, and that the jurisdiction of Georgia in the soil extends over to the line which is washed by the water, wherever it covers the bed of the river within its banks. The permanent fast-land bank is referred to as governing the line. From the lower edge of that bank, the bed of the river commences, and Georgia retained the bed of the river from [* 419] the lower edge of the *bank on the west side. And where the bank is fairly marked by the water, that water level will show at all places where the line is.

NELSON, J. This is a writ of error to the supreme court of the State of Alabama.

Ingersoll, the plaintiff below, and defendant here, brought an action against Howard for setting back the water of the River Chattahoochee upon his lands and mill by the erection of a dam across the said river, at the city of Columbus, in the State of Georgia, by reason whereof the operations of his mill were obstructed, and the use of his premises impaired.

The defendant pleaded the general issue.

On the trial, it appeared that the plaintiff was the owner of a lot of land held under a patent from the United States, situate on the west bank of the Chattahoochee River, in the State of Alabama, opposite the city of Columbus, and which lot had for its eastern boundary the State of Georgia.

This river has high bluff banks in some parts of it on both sides; in others, the banks are low, and the adjacent lands subject to inundations in high water, extending for nearly a mile from the bank. At the plaintiff's land, the banks are from fifteen to twenty feet high

on both sides, and somewhat abrupt, and above and below for some distance. The abrupt and high banks, however, on the plaintiff's side of the river, do not extend down to the water's edge at ordinary low water. Between the high bluff and the water at this stage, the distance varies from fifty to one hundred and fifty feet; and this intermediate space is flat bottom-land, gradually descending from the base of the bluff to the water, and upon which flat grow trees, such as pines, oaks, gums, poplars, &c. Upon this flat the plaintiff's grist-mill is built, and a road made along under the bluff leading to it. There is, also, a saw-mill and cotton-gin factory standing upon it. And a small portion of the flat is at times put under cultivation.

In the ordinary state of the river in the winter season, the water covers this flat about halfway to the high bluff, extending to the base of a bank or ridge of sand and gravel; and in freshets, the water covers the flats reaching to the bluff. It is only in a full state of the river, or freshets, that the water overflows the sand bank or ridge before mentioned.

I have collected these facts from the two cases before us between these parties, each of which involves the same general question.

The plaintiff supplies his grist-mill with water by a wing dam extended obliquely into the river.

* The defendant erected a dam across the river some three [* 420] hundred yards below the plaintiff's mill, and opposite the city of Columbus. The dam is from four to five feet high, and at an ordinary stage of the river, the water is thrown back upon the plaintiff's mill so as to prevent its use. The defendant possesses a grant of the bed of the river upon which his dam is erected, derived from the State of Georgia, and extending to high-water mark on the western bank of the river.

The court charged the jury that a person passing from the State of Georgia across the River Chattahoochee to the State of Alabama at ordinary low water, would be upon the bank as soon as he left the water on the western side; and, that the line described in the treaty of cession from Georgia to the United States, as running up said river, and along the western bank thereof, is the line impressed upon the land by ordinary low water, to which charge the defendant excepted.

The defendant asked the court to charge, that, if the bank of the river was ordinary low-water mark, the plaintiff had no right to the use of the water at that stage, which was also refused, and an exception taken.

This case involves a question of much higher interest and importance than a simple decision upon the rights of these parties, as the

court see that the decision cannot be reached without a determination of the boundary line between two sovereign States, for a distance of some one hundred and fifty miles. The facts in the record are few, being confined to a description of the localities respecting this boundary at the point in dispute, and the few that are disclosed, very imperfectly and confusedly stated. It is to be regretted that the court is obliged to pass upon a question of this magnitude under these embarrassments, and in the absence of any opportunity, on the part of the two States interested, to furnish the necessary topographical information in respect to the River Chattahoochee and its western banks for the whole distance within which they constitute the boundary between them.

This information would have been useful to aid the court in a proper determination of the question, and would naturally have been furnished, if the controversy had been between the States themselves.

The words of the cession of Georgia to the United States, in 1802, describing the boundary line in question, and which are material to be noticed, are as follows: Georgia cedes the territory "west of a line beginning on the western bank of the Chattahoochee River, running thence up the said River Chattahoochee, and along the western bank thereof and the great bend;" and the United States [* 421] cede to Georgia all their rights "to the territory lying "east of the boundary line herein described as the eastern boundary of the territory ceded by Georgia to the United States."

This is the description of a line that has become the boundary between Georgia and Alabama, for a distance of one hundred and fifty miles.

Two constructions are contended for, arising out of the description: On the part of Georgia it is claimed that her boundary extends to high-water mark, on the western bank of the Chattahoochee River for the whole length of this line. On the part of Alabama, that it stops at ordinary low-water mark, on the western bank of said river.

The difference is very material, as it will be seen that upon the former construction, Alabama can have a water or river line for her boundary only during high water or a freshet, which is but an occasional and temporary state of the river, and consequently the owners of the land on the Alabama side, for the greater portion of the year, and for all practical use of the water for agricultural or hydraulic purposes, would be deprived of a river boundary. And this difference is the more striking when we see, from the evidence in the record, scanty and meagre as it is, the strip of land between the high bank and the river, that is, between high and ordinary low-water mark, would be from ten to twenty and more rods in width, varying with

the character of the bank, which would belong to Georgia, or to the owners on the Georgia side of the river, and over which the jurisdiction and government of Georgia would necessarily extend, to the exclusion of Alabama.

We have no evidence in the record as to the distance the tide ebbs and flows up this river. It probably does not reach the point where the boundary in question begins, which is at the 31st degree of north latitude. It is navigable for steamboats up to Columbus, which is within some thirty or forty miles of its termination as a boundary between the two States; and, as I am informed, is navigable above the great bend, or west point, for small craft, for some one hundred miles, though interrupted by rocks and falls between that and Columbus.

Grants of land, bounded by the sea, or by navigable rivers, where the tide ebbs and flows, extend to high-water mark, that is, to the margin of the periodical flow of the tide, unaffected by extraordinary causes, and the shores below common high-water mark belong to the State in which they are situated. But grants of land bounded on rivers above tide water, or where the tide does not ebb and flow, carry the grantee to the middle of the river, unless there are expressions in the terms of the grant, or something in the terms taken in connection with the *situation and condition of the lands [* 422] granted, that clearly indicate an intention to stop at the edge or margin of the river. There must be a reservation or restriction, express or necessarily implied, which controls the operation of the general presumption, and makes the particular grant an exception.

These are familiar principles of universal application, governing the construction of grants of land bounded upon the sea or tide water, or upon freshwater rivers, navigable or unnavigable, and whether made by States or individuals, or in large or small tracts. And in applying them to the description of the cession before us, we shall be enabled to determine where the boundary line in dispute should be drawn. The words are: "beginning on the western bank of the Chattahoochee River," "running thence up the said River Chattahoochee, and along the western bank thereof."

Where land adjoining a freshwater river, or above tide water, is described as bounded by a monument, whether natural or artificial, such as a tree or a stake standing on the bank, and a course is given as running from it up or down the river to another monument standing upon the bank, these words necessarily imply, as a general rule, that the line is to follow the river, according to its meanderings and turnings, and the grantee takes to the middle of the river. Such is

the uniform construction given to this description where the common law prevails. It has been repeatedly applied to grants abutting on the River Mississippi, the Missouri, the Hudson, the Connecticut, and other great rivers in the United States, above tide water. 3 Kent's Com. 427, 428, 429, and notes; Angell on Watercourses, c. 1, ed. 1850.

Had the description in this case been limited to the first two calls in the grant, it would have been impossible to have taken it out of this rule of construction; and the owners on the Alabama side would have been carried to the middle of the river. But the third call, which is "along the western bank thereof," limits the effect and operation of the other two, and excludes the bed of the river. It indicates an intent to reserve the river within the boundary and jurisdiction of Georgia, and to confine the grantee to the western edge or bank. And this raises the material and important question in the case, namely, where shall that line be drawn? On behalf of Georgia, it is contended it shall be drawn on the bank or bluff, as described in the record, at high-water mark; on behalf of Alabama, at the bank or ridge of sand and gravel, where the western margin of the river is found at ordinary low-water mark.

Now, it is to be observed, that the language of the cession, beginning on the western bank, and running thence up the river and along the bank, does not necessarily, nor, as I think, reasonably, [* 423] * call for a line along the bluff or high bank, such as confines the body of water in the river at high water, or when swollen with floods. The bank inclosing the flow of water, when at its ordinary and usual stage, is equally within the description; and the limit within this bank, on each side, is more emphatically the bed of the river, than that embraced within the more elevated banks when the river is at flood. These are more or less distant from the ordinary channel, depending upon the character of the river, and topography of the adjacent lands. There are usually in rivers of this description banks representing the point which is reached at high water, and which bound it at that stage of the river. They may be, and not unfrequently are, at a considerable distance from the accustomed bed and the banks which then bound it. The flats intermediate may comprise the most valuable portion of farms bounded upon the river and extending back to the uplands, notwithstanding they may be inundated by the spring and fall freshets. The valleys of the Mohawk, and Hudson, and Connecticut rivers, may be referred to as illustrations, and also the Susquehannah, both in New York and Pennsylvania. Some of the finest alluvial bottom-land in New York is found in the valley of the Mohawk, between the banks of the river

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at its usual stage and the banks at high water, which is the beginning of the uplands. If these alluvial bottoms are found in the valley of the Chattahoochee, and for aught I know they may be, according to the boundary line contended for by the plaintiff in error, the settlements within the State of Georgia would not be bounded by the river, as most valuable possessions for sites of towns, and for hydraulic and even agricultural purposes, might be found lying along its western margin.

I cannot think that it is necessary to occupy more time in attempting to refute the claim to this boundary line according to the terms used in the cession by Georgia.

Then, if we leave the bank at what is called high-water mark, as not given by any reasonable interpretation of the grant, on what principle or rule of construction is an intermediate line to be drawn short of the ordinary and permanent bed of the river. It would be a boundary wholly undefinable, and designated neither by high water nor low water, nor by the usual stage, but left to vibrate between what is called high water and the accustomed bed of the river.

The term high water, when applied to the sea, or to a river where the tide ebbs and flows, has a definite meaning. The line is marked by the periodical flow of the tide, excluding the advance of waters above this line in the one case by winds and storms, and in the other by freshets or floods.

* But in respect to freshwater rivers, the term is alto- [* 424] together indefinite, and the line marked uncertain. It has no fixed meaning in the sense of high-water mark when applied to a river where the tide ebbs and flows, and should never be adopted as a boundary in the case of freshwater rivers, by intendment or construction, whether between States or individuals. It may mean any stage of the water above its ordinary height, and the line will fluctuate with every varying freshet or flood that may happen.

In our judgment, the true boundary line intended by Georgia and the United States, and the one fairly deducible from the language of the cession, is the line marked by the permanent bed of the river by the flow of the water at its usual and accustomed stage, and where the water will be found at all times in the season except when diminished by drought or swollen by freshets. This line will be found marked along its borders by the almost constant presence and abrasion of the waters against the bank. It is always manifest to the eye of any observer upon a river, and is marked in a way not to be mistaken. The junction of bank and water at this stage of the river, satisfies the words of the cession, and furnishes a line as fixed and certain as is practicable; and is just and reasonable to all the parties

concerned. It excludes the high bluffs or banks, which the river touches but occasionally, when swollen with freshets or floods; and also an intermediate line, which can be neither marked nor described; and adopts a boundary along the bank and margin of the river of some permanency, and which parties providing for a river boundary between them would naturally have in their minds. That they intended a river boundary in this treaty of cession I cannot doubt. That Georgia intended to reserve to herself the bed of the river, is equally clear. The line which I have designated satisfies both intentions, and, in my humble judgment, no other boundary line will.

There are some general considerations bearing upon the question which should not be overlooked.

This court observed, in the case of *Handley's Lessee v. Anthony*, 5 Wheat. 374, 379, through the chief justice, that "when a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly created State extends to the river only. The river, however, is the boundary." "In case of doubt," says Vattel, "every country lying upon a river is presumed to have no other limits but the river; because [* 425] nothing * is more natural than to take a river for a boundary, when a State is established on its borders; and wherever there is doubt, that is always to be presumed which is most natural and probable."

Again the court say: "Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would be extremely inconvenient to extend its dominion over the land on the other side, which was left bare by the receding of the water. Wherever the river is a boundary between States, it is the main, the permanent river which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark."

These views are sound and just, and the mind at once assents to them. And they apply directly and with great cogency to the question before us.

Let us now return to the case immediately under consideration. The court instructed the jury that the boundary line described in the treaty of cession from Georgia to the United States, as running up the said river and along the banks thereof, was the line impressed

upon the land by ordinary low water. I am not certain but that the line here designated, or rather intended to be designated, is the same that we have attempted to define in this opinion. "Ordinary low water," however, like "low water," is a relative term, and in the abstract, and without practicable application, has no definite meaning, and furnishes no satisfactory guide by which to ascertain or determine the line in question. I freely admit, that if the terms of the cession would justify the interpretation given to that of the territory northwest of the Ohio, I should greatly prefer the line adopted in *Handley's Lessee v. Anthony*, which was low-water mark.

But the call here for the bank seems necessarily to connect that with the river in defining the boundary, and restricts it somewhat to a greater extent than in the description of the line in the case mentioned.

As the general question involved is one of very great importance, and the ruling not necessarily conveying the instruction I think should have been given, I agree that a new trial should be granted.

The defendant requested the court to instruct the jury that, if the bank of the river was ordinary low-water mark, the plaintiff had no right to use the water at that stage, which was refused.

This instruction, we suppose, was asked for on the ground that, admitting the boundary line to be fixed at ordinary low-water mark, inasmuch as the bed of the river within that limit belonged *to Georgia, and the defendant's grant, derived from that [* 426] State, authorized the erection of his dam to the height claimed, he had a right to set back the water up the bed within the aforesaid limit; and the complaint, therefore, that the back water interfered with the supply of water to the plaintiff's mill, by obstructing the natural current of the river, was unfounded, as the defendant had a right, to this extent, to obstruct it. If this was the meaning of the instruction prayed for, there was error in the refusal.

Undoubtedly the plaintiff has no right, under his grant from the United States, to erect a dam in the bed of the river within the boundary line of Georgia, for the purpose of supplying his mill with water. But I am not prepared to admit that he cannot supply it by diverting the water upon his own land, without crossing the boundary line, as by sinking a trench or ditch, if by so doing he works no injury to the rights of others. Every proprietor of land on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands. No proprietor has a right to use the water to the prejudice of other proprietors, above or below, unless he has acquired a prior right to divert it. He has no property in the water itself, but a simple usufruct while it passes

along. Any one may reasonably use it who has a right of access to it; but no one can set up a claim to an exclusive right to the flow of all the water in its natural state; and that what he may not wish to use himself shall flow on till lost in the ocean.

Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar a riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use works no substantial injury to others.

These principles will be found stated more at large by Chancellor Kent, in his Commentaries, 3 Kent's Com. 439, 440, 441; and also by Parke, J., in a very recent case in the court of exchequer in England, *Embry and another v. Owen*, 4 Eng. Law and Eq. R. 466, 476, 477.

GRIER, J. I concur with my brother Nelson.

CURTIS, J. In these cases, I concur with the majority of the court in the opinion that each of the judgments should be reversed, but I withhold my assent from much of the reasoning contained in the opinion. I do so, because I am not entirely satisfied of its [* 427] * correctness, as I apprehend its extent and bearings; and

because the cases involve a question of boundary between the States of Georgia and Alabama, and highly important riparian and other rights connected therewith, or dependent thereon, in reference to which I desire to stand committed to no opinion, and to no course of reasoning, beyond what seems to me absolutely necessary for a final decision upon the private rights now before us.

This obliges me to state my own views of what I deem necessary to be decided, and the conclusions at which I have arrived. I shall do so very briefly, and without entering into an examination of the principles and authorities which have brought my mind to those conclusions.

My opinion is: 1. That the calls contained in the act of cession, place the western line of Georgia on the western bank of the Chattahoochee River, at the place in question in these cases.

2. That the act of cession is silent as to the particular part of the bank on which the line is to be run. But inasmuch as it must be run on some particular part of the bank, we are obliged to resort to the presumed intentions of the commissioners and the parties, inferable from the nature of the line, as a line of boundary of political jurisdiction as well as of proprietorship, and, according to that presumed intention, we must declare it to be on that part of the bank which

will best promote the convenience and advantage of both parties, and most fully accomplish the apparent and leading purpose to establish a natural boundary.

3. That the banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below, or at a middle stage of water, must depend upon the character of the stream. The height of a stream, during much the larger part of the year, may be above or below a middle point between its highest and least flow.

* Something must depend also upon the rapidity of the [* 428] stream and other circumstances. But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water.

4. Taking along with us these views respecting the bed and banks of a river, it will be obvious that the lowest line of the bank, being the line which separates the bank from the bed, is a natural line, capable of being found in all parts of the river, impressed on the soil; and this is true of no other line on the bank; for though in some places the banks of a river may have so marked a character, that there would be no difficulty in tracing the upper line of the bank, and pronouncing, with certainty, that the bank there terminates, yet it is not to be supposed that this would be true throughout the course of a long river; and one of these cases finds, that in some places the banks of this river are low, and the adjacent lands on either side subject to occasional inundation. In such places, it would be impracticable to fix on a precise line as the upper termination of the bank.

Now, it is clear, that inasmuch as this line of the act of cession was to be a line of boundary of political jurisdiction, it must have been deemed by the commissioners when they fixed it, and by the parties when they assented to it, of great importance to have a natural boundary, capable not only of being ascertained upon judicial inquiry, but of being seen and recognized in the common practical affairs of life. And, therefore, I am of opinion, that as the calls for this line do not expressly require it to be on any particular part of the bank, it should be located on the bank where the leading purpose, to have a natural boundary between the two jurisdictions, will be most effectually attained. The convenience and advantage of both parties require this. The line, therefore, is at the lowest edge of the bank, being the same natural line which divides the bank from the bed of the river.

The above brief statement of my views, while it exhibits all to which I have given my assent in these cases, will show why I concur in the opinion that the rulings, brought before us by these writs of error, were erroneous.

Order in No. 121. This cause came on to be heard on [* 429] the transcript of the record * from the supreme court of the State of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said supreme court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said supreme court, to be proceeded with in conformity to the opinion of this court, and as to law and justice may appertain.

Order in No. 131. This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Georgia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo*, and to proceed therewith, in conformity to the opinion of this court.

JOHN NORRIS, Plaintiff, v. EDWIN B. CROCKER and ELISHA EGBERT.

13 H. 429.

The 4th section of the act of February 12, 1793, (1 Stats. at Large, 305,) respecting fugitives from service, is repealed, so far as it relates to the penalty, by the act of September 18, 1850, (9 Stats. at Large, 462,) and an action for the penalty, pending at the time of the repeal, is barred.

THE case is stated in the opinion of the court.

O. H. Smith, for the plaintiff.

Chase, contra.

* CATRON, J., delivered the opinion of the court. [* 438]

The following questions are certified to us on a division of opinion from the circuit court for the district of Indiana.

1. Whether the 4th section of the act of 1793, respecting persons escaping from service of their masters is repealed, so far as relates to the penalty, by the act of 1850, on the same subject.

2. Whether, if the act of 1793 is repealed as to the penalty, the repeal will bar an action that was pending at the time of the repeal.

The fugitive slave law of 1850 does not repeal the 4th section of the act of 1793 in terms; and if it is repealed, it must be by implication. As a general rule it is not open to controversy, that where a new statute covers the whole subject-matter of an old one, adds offences, and prescribes different penalties for those enumerated in the old law, that then the former statute is repealed by implication; as the provisions of both cannot stand together.

To ascertain whether there be repugnance, the two enactments must be compared.

The 4th section of the act of 1793, provides: 1. That any person who shall knowingly and willingly obstruct or hinder a claimant, his agent or attorney, in arresting a fugitive from labor;

Or, 2. Shall rescue the fugitive from the claimant, his agent or attorney, after he has been arrested;

Or, 3. Shall, knowingly and willingly, harbor or conceal the fugitive, knowing he is such; that, for committing either of said offences, such person shall forfeit and pay the sum of five hundred dollars; which penalty may be recovered by the claimant for his own benefit; and reserving also to the claimant his right of action in damages for the actual injuries he may have sustained, be they more or less.

The act of 1850, section 7, declares:—

1. That any person who shall, knowingly and willingly, obstruct, hinder, or prevent such claimant, his agent or attorney—or any per-

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son, or persons, lawfully assisting him, her, or them, from arresting such fugitive — either with or without process ;

Or, 2. Shall rescue, *or attempt to rescue*, such fugitive, when arrested, from the custody of the claimant, his agent or attorney, [*439] *ney, *or from the custody of any other person, or persons, lawfully assisting ;*

Or, 3. Shall *aid, abet*, or assist the person owing service, directly or indirectly, or escape from such claimant, his agent or attorney, *or other person or persons legally assisting ;*

Or, 4. Shall harbor or conceal such fugitive, *so as to prevent his discovery and arrest*, after notice or knowledge of the fact that such person was a fugitive ; the person so offending, in either of the cases specified, shall be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, on conviction by indictment. Secondly, that the person thus offending, shall forfeit and pay, by way of civil damages, to the party injured by such illegal conduct, the sum of one thousand dollars for each fugitive lost, by reason of such conduct, to be recovered by action of debt.

And the question is, whether the foregoing provisions of the act of 1850 are repugnant to those contained in the act of 1793, so far as the penalty of five hundred dollars is concerned.

The former statute gives this penalty to the owner in three cases ; for obstructing an arrest ; for a rescue ; and for harboring the fugitive. It was given, regardless of the fact, whether the owner had or had not recovered his slave ; and in addition, by the act of 1793, he might sue for and recover the value, if the slave was lost by the illegal conduct of the defendant ; or he might recover inferior damages, if the slave was obtained.

By the act of 1850, a penalty is inflicted, by way of fine, on conviction ; and imprisonment is added. The prosecution is at the instance of the United States, with which the owner of the slave is not necessarily connected, the government taking the penalty recovered ; nor is it of any consequence, under this mode of proceeding, whether the owner has or has not recovered his slave ; the offender being equally liable to prosecution for committing any one of the offences enumerated in the statute, including the old ones, found in the act of 1793, and the additional ones, superadded in that of 1850, and which are indicated by the words in italics. The recent statute covers every offence found in the former act, which subjects the offender to a penalty of five hundred dollars, and prescribes a new, and different penalty, recoverable by indictment ; and is plainly repugnant to the act of 1793.

A seeming difficulty exists, in the concluding part of the seventh

section of the new act, which awards civil compensation to the owner for the loss of each slave, if that loss was occasioned by any one of the illegal acts that are made indictable; but no recovery under and by force of the statute can be had, unless the owner has lost the slave. The policy of the law is *obvious. On trials, [*440] illegal conduct and loss might be fully established; but then the wide range of proof as to value, could still in effect defeat the suit by a verdict for low damages; and therefore congress fixed the value alike in every case of loss, and took the assessment of damages from the jury. This provision is new, and inconsistent with the fourth section of the act of 1793, in this: The former act imposes a penalty of five hundred dollars, in the enumerated cases, regardless of any actual loss on the part of the owner; whereas, for the same offences, the act of 1850 allows civil damages of one thousand dollars for each slave lost; but nothing when he is regained—loss being the ground of action; nevertheless, the party injured is left to his common law remedy for any damage he may have sustained short of actual loss of the slave by the illegal conduct of the offending party; and for actual loss also, if he prefers and elects that remedy to an action for civil damages under the statute—but both modes cannot be pursued.

We therefore answer, to the first question certified, that the act of 1850 has repealed, so far as relates to the penalty, the fourth section of the act of 1793.

The next question referred to us for decision, presents no difficulty.

The suit was pending below when the act of September 18, 1850, was passed, and was for the penalty of five hundred dollars, secured by the fourth section of the act of 1793. As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject-matter. And in the next place, as the plaintiff had no vested right in the penalty, the legislature might discharge the defendant by repealing the law. We therefore answer, to the second question certified, that the repeal of the fourth section of the act of 1793, does bar this action, although pending at the time of the repeal.

17 H. 85; 2 Wal. 450; 5 Wal. 541; 7 Wal. 506.

LEWIS ROGERS, Appellant, v. JOSEPH G. LINDSEY, HENRY S. ATWOOD, and JOHN S. BENNETT.

13 H. 441.

Question, whether a writing was intended as a naked authority to collect and control certain judgments, or as an assignment of the creditors' interest therein. *Held*, to be the former only.

THE case is stated in the opinion of the court.

Crittenden, (attorney-general,) and *Chilton*, for the appellant.

J. A. Campbell, contra.

[*442] *NELSON, J., delivered the opinion of the court.

This is an appeal from the circuit court of the United States for the southern district of Alabama.

Lewis Rogers, the appellant, and complainant below, was one of the firm of Rogers and Gray, doing business in the city of Richmond in 1836, and in the course of their business purchased of Joseph G. Lindsey, one of the defendants, a large amount of bills of exchange on the house of Goodman, Miller, and Co., of the city of Mobile, of which about the sum of \$20,000 was unpaid, and the bills protested.

Subsequently, in 1837, a settlement was effected with the firm at Mobile, and payment received in several promissory notes, all of which were indorsed by Lindsey. Among these notes was one made by Bissell and Carville, a business firm in Alabama, dated 20th April, 1837, and indorsed by John S. Bennett, payable 1st January, 1838, for \$3,297.27, and which was also indorsed by Goodman, Miller, and Co., and Lindsey. This note, and a large amount of the paper thus received in discharge of the debt of \$20,000, was dishonored at maturity, and duly protested, and judgments recovered against the several parties liable, in the circuit court of the United States in the southern district of Alabama. The judgment recovered March, 1840, against Bennett, on the note of Bissell and Carville, amounted to \$3,875. About this time the partnership of Rogers and Gray was dissolved, and the effects assigned to Rogers, the complainant.

In June, 1840, while the securities, taken in payment of the balance of \$20,000 due to the firm of Rogers and Gray, stood in this condition, Lindsey came to the city of Richmond, and made a proposition for the settlement of his liabilities as indorser upon them. They had been left with the Planters and Merchants Bank of Mobile, for collection, and judgments recovered upon them as stated. Lindsey represented that all or nearly all the parties except himself upon the paper were insolvent, and that little, if any thing, could be realized on the judgments. And he proposed to take them and give a note for \$20,000, made by himself, and indorsed by four other persons, citizens of Alabama, who he represented were responsible, and would pay the note at maturity, if Rogers would make a new ad-

[*443] vance *to him of \$10,000 on the note of one Hudgings, a citizen of Virginia.

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Upon the faith of these representations, and after some inquiries into the responsibility of the parties, Rogers agreed to the proposition, and took the note of \$20,000, which was payable the first of January thereafter, and advanced the \$10,000 on the Hudgings note; and at the same time gave to Lindsey the following writing:—

“The president or cashier of the Planters and Merchants Bank will please hold, subject to the order of Mr. J. G. Lindsey, all the debts referred to in the inclosed letter from Mr. McFarlin, except the two drafts of McCollier Minge upon the Messrs. Ellicotts, of Baltimore, which, when collected, please place to my credit.” 13th June, 1840.

The list of debts referred to in the letter of McFarlin were the securities that had been left with the bank at Mobile by Rogers for collection, and which had passed into judgments, as already stated.

When this note of \$20,000 fell due, on the 1st of January, 1840, it was dishonored, and the paper duly protested. This note has never been paid.

Lindsey, after receiving the authority to control the securities and judgments in the bank at Mobile, returned and made collections out of them to the amount of between \$3,000 and \$4,000.

Besides this amount, he has collected the judgment against Bennett to the amount of \$6,292.66, principal and interest, that being the amount due at the date of the collection by the marshal, on the execution, June 5, 1848. The judgment had been recovered March, 1840, and execution issued, returnable November term following. An *alias* was issued 31st January, 1842, returnable March term following; and a *pluries* 24th December, 1842; a second and third, January and March, 1844; and a fourth and fifth, March, 1845, and April, 1848, on the last of which the sale took place of the property of Bennett.

The execution had been delayed by proceedings in the courts to stay the sale.

This bill was filed in the court below to arrest this \$6,292.66, in the hands of the marshal, Rogers claiming that the money belongs to him. It has been brought into court and awaits the final decree in the cause.

On the 24th December, 1842, Lindsey petitioned for the benefit of the bankrupt act, passed August 19, 1841,¹ and obtained his discharge on the 2d May, 1843.

None of the securities or judgments that he received from Rog-

¹ 5 Stats. at Large, 440.

ers in June, 1840, at the time he gave him the note of [* 444] * \$20,000, is found in the list of his assets. The only allusion to them is an obscure reference in his list of creditors to the note of Bissell and Carville, which he says was given to C. D Hunter as security for a debt due him.

The ground upon which Rogers claims that he is entitled to the money collected on the judgment against Bennett, is: 1. That according to the agreement with Lindsey, at the time he took the note of \$20,000, it was not intended to vest in the latter any interest in the securities and judgments that had been left in the Planters and Merchants Bank at Mobile, for collection, but only to confer an authority upon him to take charge of the settlement and collection of the same, so that the proceeds might be applied to the payment of the note. In other words, that there was no assignment for these judgments intended, but a power to settle and convert them into money for the purpose stated, as Lindsey's residence in Alabama enabled him to give his personal attention to the business; and as he was deeply interested in realizing the payment of them, as he was on all the securities.

2. That admitting there had been an absolute assignment to Lindsey, and that it was so intended, still, the complainant is entitled to arrest the money in the hands of the marshal, and have it applied to his debt, on the ground that it was obtained by false representations, both in respect to the value of these judgments, Lindsey representing that they were worthless, and also in respect to the solvency and responsibility of the sureties upon the note of \$20,000.

On the part of Lindsey, it is insisted, that this note was given on the express condition that the judgments in the bank at Mobile were to be assigned absolutely to him for his own benefit; and that no fraudulent representations, as alleged, were made by him at the time.

The first question must depend upon the effect of the written instrument that passed between the parties as the result of the negotiation between them, as we have no other evidence on this branch of the case, except the allegations in the bill and answer. And, on looking at that instrument, we are satisfied that, upon a fair construction, it imports an authority to Lindsey to control the settlement and collection of these several demands; but not necessarily a transfer of the title to, or interest in, them.

This interpretation satisfies the words of the instrument; and there is nothing in the transaction itself, or in the relation in which the parties stood to each other, that should induce the court to give it a strained construction in favor of this defendant.

If a transfer of the interest had been contemplated, as the in-

strument *was drawn for the purpose of carrying into [*445 effect the agreement and understanding of the parties, it is surprising that words importing an assignment are altogether omitted, and those importing only an authority over the list of judgments, used. It would have been most natural to have drawn an assignment in terms. Nor do we perceive that it could have been of any material importance to Lindsey to have stipulated for a transfer. The debt of \$20,000 was his, and it would fall due in six months, and the purpose of giving this note as set up at the time, was to get some delay, so as to be able to realize something out of the securities in the bank at Mobile. And whether he, therefore, took a transfer of them, or a full authority to settle and collect them, would seem, in view of any honest purpose, a matter more of form than substance.

Our conclusion, therefore, is, that Lindsey took no interest in these judgments, as assignee, by operation of the written directions given to the Planters and Merchants Bank, by Rogers, on the 13th June, 1840; nor is there any evidence in the case leading to that conclusion.

Having arrived at this result, it is unimportant to inquire into the question of fraud relied on as vitiating the assignment upon the assumption that one had been established. There is certainly very strong grounds for doubting as to the *bona fides* of the transaction on the part of Lindsey.

The bill states that he represented the sureties upon the note of \$20,000, as men of undoubted means, and who would not allow their paper to be dishonored, and that, if he did not take it up at maturity, they would.

This Lindsey substantially admits in his answer. And yet, the note was dishonored, and no portion of it paid by these sureties; and, as is apparent from the evidence, the demand could not have been collected by force of law. It is unimportant, however, to pursue this branch of the case.

The next and only remaining question in the case is, in respect to an interest set up by the defendant, Atwood, in this judgment against Bennett. He claims an interest to the amount of \$2,500, by an assignment from Lindsey, since his discharge under the bankrupt act, some time in the year 1843 or 1844, by way of securing the payment of an old debt due before the proceedings under that act.

The bill charges, that Atwood knew Lindsey had obtained the control of the judgment against Bennett by false representations; and that he conspired with him to consummate the fraud thus committed upon the complainant.

This allegation is not met and denied in the answer. Nor is

there any denial of knowledge that Lindsey had obtained [*446] no *interest in, or title to, the judgment from the plaintiffs in the same, or from Rogers, the complainant. He says he does not remember that he ever saw any evidence of title to the judgment in Lindsey from Rogers and Gray, the plaintiffs, or from either of them, but avers that he knew he had a title to the same from one Hunter. Neither does Atwood set up in his answer that he obtained the assignment of the interest he claims in the judgment *bond fide*, and without notice of the title of the complainant.

Under these circumstances, and in view of the nature of the defence set up by Atwood, it is quite clear he does not bring himself within the rule in equity which protects the title of a purchaser without notice. The bill virtually charged him with notice of the complainant's interest in the judgment, for the purpose of invalidating any claim that he might set up to the same under the assignment; and in order to protect himself, and to show that he was not in privity with Lindsey, he was bound to aver in his answer, that the purchase was made for a valuable consideration without notice.

Neither can he protect himself under the averment in the answer, that Lindsey obtained a title to the judgment from Hunter.

The facts are, that Hunter, in the fall of 1841, took an assignment of this judgment from Lindsey, in consideration of a lot of land in Wilcox county, Alabama; and that in the spring of 1844, he reassigned the same and took Lindsey's note for the demand. Lindsey, being the original party to the fraud, is disabled from setting up this title of Hunter, conceding it to be a good one against the complainant. The reassignment clothes him with no better title than he possessed when he assigned the judgment to Hunter.

A purchaser with notice may protect himself by obtaining the title of a purchaser for a valuable consideration without notice, unless he be the original party to the fraud. The *bond fide* purchase purges away the equity from the title in the hands of all persons who may obtain a derivative title, except it be that of the original party, whose conscience stands bound by the violation of the trust, and a meditated fraud. 1 Story, Eq. Jur. 397, 398, and cases. Atwood, therefore, can derive no benefit from the purchase of Hunter, even if that had purged the equity of Rogers, as that equity immediately attached on the reassignment of the judgment to Lindsey, and bound it in his hands; and any one coming in under him chargeable with notice, stands in no better situation.

In every view, therefore, that we have been able to take of the case, we think the decree of the court below erroneous, and [*447] *should be reversed, and the proceedings remitted; with

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directions to enter a decree that the complainant is entitled to the fund in court collected upon the judgment against Bennett, together with costs of suit in this court and in the court below.

**MORGAN McAFEE, MADISON McAFEE, and JAMES ALFORD, Plaintiffs
in Error, v. JAMES T. CROFFORD.**

13 H. 447.

Where an execution was levied on slaves, and a delivery bond given, in Mississippi, and on its forfeiture, which operated as a judgment against the principal and surety, the surety took the slaves by force out of the possession of the principal and subjected them to sale on the execution, and thus satisfied the judgment, in an action of trespass by the principal against the surety, *held*, that the latter might recoup from the damages the amount of the judgment so satisfied.

The jury having found that, in consequence of the wrongful abduction of the plaintiffs' slaves, the cattle of the neighbors destroyed his corn, and a flood in the river swept away a quantity of his wood, *held*, that it was not erroneous to include the value of these things in the damages, in an action of trespass for carrying away the slaves.

THE case is stated in the opinion of the court.

Brooke and Volney E. Howard, for the plaintiffs.

F. P. Stanton, contra.

* M'LEAN, J., delivered the opinion of the court. [*454]

This case is before us on a writ of error, to the district court for the northern district of Mississippi.

A judgment was obtained in favor of the Commercial Bank of Manchester against James T. Crofford and Morgan McAfee, in the state court of Tallahatchie county, Mississippi, the 24th of November, 1840, for the sum of \$4,143.93, on which an execution was issued, and levied on sundry slaves of Crofford, who owed the debt; McAfee, the other defendant, being his security, a delivery bond for the property was executed, which was forfeited the 22d of November, 1841, by which forfeiture the bond had the effect of a judgment. On this latter judgment an execution was issued, which was levied on twenty-one negroes owned by Crofford, all of whom, except three, were sold by the sheriff for \$6,132.

Some time after the first levy, it appears that Crofford removed with his slaves across the Mississippi, and settled on a plantation on that river, in Arkansas, not far from his former residence in Mississippi.

A short time before the last levy, Morgan McAfee, with an armed force, in the absence of Crofford, crossed the river, seized, from day

to day, twenty-one of the negroes on his plantation, and brought them into Mississippi. The other slaves of Crofford were alarmed and absconded, and were not reclaimed before the lapse of [* 455] from four to six weeks. The overseer of Crofford *remonstrated, and some steps were taken to arrest the proceedings of McAfee, but his force was too strong, and he threatened to kill any one who should interfere with him in taking off the negroes. For this trespass, an action was brought against the plaintiffs in error. In the declaration, it was alleged that, by reason of the trespass, the plaintiff lost the services of thirty negro men and as many women, &c., which, through fear, absconded, besides the number taken by McAfee, and that he was subjected to great expense in reclaiming them; that by taking the slaves, chasing, and frightening the others from his farm and wood-yard, and from and about the business of the plaintiff, he was greatly damaged, &c. The defendants pleaded not guilty, &c. A verdict for \$10,613 was rendered by the jury, on which a judgment was entered. To reverse that judgment the writ of error was brought.

The exceptions arise out of the rulings of the court and the charge to the jury.

The trespass was proved as charged in the declaration. The party were several days in searching for and arresting the negroes, and all on the plantation not taken were frightened and fled.

The male slaves were employed in cutting cord-wood, and supplying Crofford's wood-yard. He had, at the time of the trespass, it was proved, from eighteen hundred to two thousand cords of wood cut on the low ground back from the river, which was worth \$2 per cord, and sold at the yard for \$2.50; the hauling cost fifty cents per cord; that the river became swollen by rain, and having no hands to remove the wood to the yard, much of it was carried off by the flood, and what remained, was so injured by being under water as to make it unsalable; that having no hands to attend the crop, the horses, mules, and other stock of the neighborhood, broke into the cornfield and destroyed a large part of it; that corn was worth fifty cents a bushel at that time. There were one hundred and twenty acres in corn, which, with proper attention and protection, would have yielded forty bushels to the acre.

The defendant offered in evidence the judgment of the Commercial Bank against Crofford, as principal, and himself as surety, and a receipt for the payment of the judgment, amounting to the sum of \$6,233.38, in mitigation of the damages claimed on account of the trespass, which, though objected to by the plaintiff, was admitted.

The evidence was admissible on two grounds. First, to explain

the motive of the plaintiffs in error in committing the trespass, and thereby, in some degree, to mitigate the damages claimed.

* Second, to reduce or abate from the damages the amount [* 456] paid in discharge of the judgment, not as an offset, but in mitigation of the injury done. This right resulted from the relation between the parties. McAfee was a co-defendant with Crofford in the judgment, but he was security only, and he had a right to expect, from the forthcoming bond and the assurances of Crofford, that the negroes first levied on would be delivered up in satisfaction of the second execution. In an answer in chancery, he alleged that the bank judgment had been satisfied. A stranger could not take the property of his neighbor, have it sold under process, and apply the proceeds in discharging the debts of his neighbor, and then claim the right to have such payments received, as a set-off, or in mitigation of the damages done by the trespass.

The plaintiff below then introduced the transcripts of two judgments in the district court against Morgan McAfee, one in favor of Crofford, the other assigned to him, amounting to \$2,100 and upwards, which, though objected to by the defendants, was admitted by the court. For what purpose this evidence was introduced was not stated; and under such circumstances, if the records of the judgments were admissible for any purpose, the exception to the evidence cannot be sustained.

It was proved, that at New Orleans, before the trespass was committed, McAfee agreed with Crofford to return to Mississippi and make an arrangement with the bank to give one, two, and three years, for the payment of the judgment against Crofford and himself; and he agreed to credit on said judgment the above judgments against himself.

We think that those judgments were properly admitted as evidence because they conduced to show that Crofford, in removing with his slaves to Arkansas, was less blamable than charged by the defendant McAfee, as he had grounds to believe that a part of the bank judgment would be paid by McAfee, and that an indulgence of some years would be obtained, for the payment of the balance.

The judgments being admissible on this ground, it is unnecessary to inquire whether they were not evidence to reduce the bank judgment paid by McAfee, under his agreement. This point might have been made, if the court had been requested to instruct the jury that this effect could not be given to the evidence by the jury. The judgments being admissible for the purpose first stated, it is unnecessary to inquire if it were practicable to do so, which it is not, how the evidence was applied by the jury.

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The record of certain proceedings against the commercial [* 457] * Bank of Manchester, in the nature of a *quo warranto*, was offered by the plaintiff in evidence, to show that the bank was enjoined from proceeding to collect debts. This proceeding was had in the circuit court of Yazoo county. An injunction was issued as stated. And at November term, 1846, the court decided on the demurrers filed in favor of the bank, from which decision an appeal was taken to the high court of errors and appeals of the State. The court admitted the evidence, overruling the objections made to it.

These proceedings, it is presumed, were pending in the court of appeals at the time the trespass was committed, as the contrary does not appear; but it is not perceived that the evidence could have had any other effect than to rebut the mitigating circumstances relied on by the defendants. In this view the evidence was admissible.

The loss of the services of the slaves, by the trespass, necessarily resulting from the abduction of a part of them, and driving off the others, are clearly within the rule of damages in trespass; and we think the loss of the cord-wood, as proved, and the injury to the corn-crop, were also within it.

It is argued, that unless the inclosure for the protection of the crop was such as the law required, no damages could be allowed for the trespasses charged, and that the owners of the trespassing animals were liable, and consequently the plaintiffs in error were not liable.

Whether there was, at the time, a law in Arkansas regulating inclosures, we have not examined, as it is a matter which can have no influence in the case. The question was fairly submitted to the jury, whether, under the facts and circumstances proved, the injury to the corn-crop resulted from the loss of the hands. This was a matter of fact for the jury, whether the fence of the plaintiff was good or bad; if, by reason of the loss of the slaves, the breaches in the inclosure could not be repaired, or the plaintiff was unable to guard his field, as was his custom, was an inquiry for the jury; and in making up their verdict, they must have considered the facts and circumstances connected with this branch of the case.

The same remarks apply to the cord-wood. Had the plaintiff not been deprived of his hands, he might have removed, sold, or in some other manner secured, the wood from being floated off by the flood. In regard to the corn and the wood, if the damage was a consequence, which necessarily followed the loss of the hands, the plaintiffs in error were liable. The instructions of the court were general and correct. 5 Phil. Ev. 188, 189; Barnum v. Vandusen, 16 [* 458] Conn. 200; Carrington v. * Taylor, 11 East, 571; 2 Greenleaf's Ev. §§ 253, 254, 268 and 270, 272, 635 a.

The trespass was of an aggravated nature ; notwithstanding the mitigating facts set up by the defendants, it was lawless and wholly inexcusable. It was a resort to physical force in defiance of law, and under such circumstances as to endanger life and property. Such a procedure should be reprehended by every good citizen. It gives a high claim to the injured party for exemplary damages. We think there was no error in the proceedings ; consequently, the judgment of the district court is affirmed, with costs.

CATHARINE HILL, Plaintiff in Error, v. JOSEPH W. TUCKER, Executor of ABNER ROBINSON, deceased.

13 H. 458.

Though a judgment obtained against one executor in a State where he has qualified, is not conclusive against another executor in another State where he has qualified, it is *prima facie* valid ; and a bar by the statute of limitations, of the original cause of action, is not a bar to a suit on such judgment.

Article 3505, of the Code of Louisiana, does not apply to, or limit suits on paper not negotiable.

THE case is stated in the opinion of the court.

Johnson and Duncan, for the plaintiff.

Taylor, contra.

* WAYNE, J., delivered the opinion of the court. [*462]

This case was brought up, by writ of error, from the circuit court of the United States for the eastern district of Louisiana.

It was argued with the case of *Goodall v. Tucker*, 13 How. 469, but the facts being somewhat different, and the prayers to the court not exactly alike in both cases, it will be necessary to consider them separately.

First, then, as to Catharine Hill's case.

She filed a petition in February, 1848, in the circuit court of the United States for the eastern district of Louisiana against Tucker, the executor of Robinson. She was the widow and sole devisee of James P. Wilkinson, who resided in Richmond, Virginia, and after his death, intermarried with Hill, by whose authority she prosecuted this suit.

Robinson lived also in Richmond, although his property was chiefly situated in Louisiana. In December, 1842, Robinson died in Richmond, having made a will a few days before his death, and appointed, as executors, William R. Johnson and Joseph Allen, of Virginia, and Thomas Pugh and Joseph W. Tucker, of Louisiana.

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Johnson and Allen qualified as executors in Virginia, and Tucker in Louisiana.

The causes of action, in the suit brought by Catharine Hill, were the four following, which will be separately noticed under the letters A, B, C, D.

[A] On the 9th of December, 1839, Archer Cheatham made a promissory note, payable ninety days after date, promising to pay to the order of Abner Robinson and Isham Puckett, \$1,000, negotiable and payable at the Bank of Virginia. It was indorsed by Robinson and Puckett, and came into the possession of Wilkinson. Not being paid at maturity, it was protested.

In March, 1840, Wilkinson brought an action against the drawers and indorsers in the circuit superior court of Henrico county, Virginia, and recovered a judgment.

In July, 1840, he issued an execution, which, in August, was suspended until further orders. Cheatham and Puckett soon afterwards took the benefit of the bankrupt act, passed by congress. Nothing further was done as to this claim until Catharine Hill filed her petition as above stated.

[B] On the 20th of November, 1840, Robinson gave the following due-bill.

"\$575. Richmond, November 20, 1840. Due James P. Wilkinson, for value received (namely, cash loaned,) \$575. Given under my hand this day and date as above written. Abner Robinson."

In February, 1843, Wilkinson brought a suit in the Henrico county court, against Johnson and Allen, the Virginia executors of Robinson, and in the ensuing June, obtained a judgment. A *fi. fa.* was issued, but the return was "no effects found."

[C] On the 19th of August, 1842, Robinson made the following single bill.

"\$200. Richmond, August 19, 1842. Due James P. Wilkinson, two hundred dollars for money borrowed this day, as per check on the Farmers Bank of Virginia, of the same date, &c. Given under my hand and seal as above. Abner Robinson. (Seal.)"

In February, 1843, Wilkinson brought a suit against Johnson and Allen, upon this bill, and obtained a judgment in the following June. A *fi. fa.* was issued upon this, and the same return made as in the preceding cases, namely, "no effects found."

[D] In October, 1843, one Bolling S. Dandridge brought a suit against Robinson for two hundred dollars, being one year's wages as overseer. After Robinson's death, it was revived against his executors. In August, 1843, Dandridge obtained a judgment, and issued

a *fi. fa.*; but the same return was made as above, namely, "no effects found." On the 1st of February, 1845, Dandridge assigned this judgment and execution to Wilkinson.

Not long after this, Wilkinson died. The record does not show when, but in April, 1846, a succession was opened in Louisiana, upon his estate, and after sundry proceedings in opposition, which it is not material to mention, his widow, Catharine, was recognized as the rightful representative of the estate. But this did not take place until May, 1847. In the mean time she had taken out letters testamentary in Virginia, in August, 1846, and married Hill in December, 1846.

On the 29th of February, 1848, Catharine Hill filed her petition against Tucker, in the circuit court of the United States for the eastern district of Louisiana, claiming the several sums of money mentioned in the four preceding classes.

Tucker filed his answer, alleging, "that the judgments set forth were obtained in Virginia, in proceedings to which he, in his capacity of executor, was no party, and that they are therefore not binding on the succession of Robinson in Louisiana. That on one of the obligations, to wit, that made by Cheatham for \$1,000, dated 9th December, 1839, Robinson, if he indorsed at all, was joint indorser with one Puckett, and was in law bound only for one half of the sum. That the actions on the demands upon which these judgments rest, are barred by the prescription of five years."

The cause came up for trial before the court without a jury, in November, 1849, when a judgment was given against Tucker. This was afterwards stricken out and a new trial granted.

*Tucker then filed a supplemental answer by way of peremptory exceptions to the petition, as a plea of prescription. It stated, in substance, that as to the judgment for \$1,000 against Robinson, which was rendered during his lifetime, the plea of limitations was interposed; that Allen and Johnson were qualified as executors in Virginia, on the 21st of December, 1842, and that more than five years elapsed between the date of such qualification and the institution of this suit; and that, by the statute of limitations of the State of Virginia, the claim was barred by the expiration of five years.

In May, 1850, the cause came up for argument a second time before the court. At the trial, the causes of action designated as B, C, and D, were proved by evidence in Virginia, taken under a commission, and records of the court as to the several judgments were given in evidence. The other facts, above stated, were also proved.

After the evidence was closed, the plaintiff asked the court to decide, as if instructing a jury upon the evidence, as follows:—

"1. The testator, Robinson, resided and died in Virginia, leaving a will, which was duly proven in the proper tribunal after his death, in and by which he appointed the defendant and others his executors, and two only of his executors made probate, and qualified in the proper court in Virginia; and if suits were instituted by the plaintiff, and by others who have assigned their judgments and the causes of action on which their judgments were founded to the plaintiff, against the executors of Robinson, who qualified in Virginia, and obtained judgments against those executors in the appropriate courts of Virginia having jurisdiction of such matters; and if upon those judgments executions issued and were returned by the proper officers in substance *nulla bona*; and if the defendant, a citizen of Louisiana, who never qualified as executor in Virginia, is a co-executor of the same estate, who has proved the will in Louisiana, and taken on himself the execution thereof in Louisiana, has in hands ample assets in Louisiana, to pay all debts; and if the evidence fully establishes these facts, that then the judgments so rendered in Virginia, are evidence against the executor in Louisiana in this suit.

2. That by the laws of Louisiana, judgments are assignable, and that upon assigned judgments the assignee can maintain an action in his or her own name therefor.

3. That under such a will as that of Robinson, produced in this cause, the co-executors, although in different States, that qualified and acted, derived the same powers from the same source over the same estate, and that unlike administrators, they are to such [* 465] estate of the decedent privies in estate; and the *exemplifications of the records of the courts of Virginia, duly authenticated, which have been read in this cause, showing judgments against the only executors of Robinson who qualified in Virginia, in the appropriate court of probate of the domicile of the deceased, are evidence against the co-executor who qualified in Louisiana, and holds abundant assets in Louisiana.

4. That if plaintiff were not entitled to recover against defendant, on the production of the records showing the judgments against the co-executors in Virginia, and that those judgments were unsatisfied, because of a lack of assets in the hands of the Virginia executors to satisfy the same, that they would be entitled to recover, on producing the further evidence to prove that those judgments in Virginia were rendered on good and valid, and subsisting and unsatisfied, causes of action against the testator, Robinson.

5. That the plaintiff has produced sufficient proof of the several causes of action, on which the judgments read in evidence were founded, to justify a jury in finding for the plaintiff upon those several original causes of action.

6. That the several causes of action set forth in the petition, independent of the judgments rendered thereon against the co-executors in Virginia, are not, upon the testimony in this cause, barred by prescription.

7. That upon all the evidence in this cause, a jury might, and should, find a verdict for the plaintiff.

8. That the several suits in Virginia, of which the records have been read, operated as a judicial interpellation to stop the running of prescription upon those several demands in favor of the defendant.

And the defendant objected to said several propositions, and the court sustained his objections, and decided all and each of the several propositions against the plaintiff, except the aforesaid proposition, No. 2; and to each of said decisions separately the plaintiff excepted.

And the defendant asked the court to decide:—

1. That no one of the records, read to the court in this cause, showing judgment against his co-executors in Virginia, was evidence against the defendant.

2. That each and every one of the causes of action, set forth in the petition, and to which evidence had been adduced, was barred as to said defendant by prescription.

3. That upon the whole evidence offered, the plaintiff was not entitled to recover; and that upon the evidence, a jury could rightfully, and should, find a verdict for the defendant; to each of which plaintiff objected.

And the court overruled the several objections of plaintiff, and *decided as asked by the defendant; and to each [* 466] of said opinions of the court, the plaintiff excepted."

We cannot concur in the suggestion made in the argument of this case, that the relations or privity between executors and testators in Louisiana differ from such as exist at common law. Louisiana, in her code, without adopting the terms of the civil law, makes the same distinction as is made at common law, between one called upon to administer the estate of an intestate, and one appointed to the office of executor by a testator. The responsibilities of both, as to the manner of settling the estate which they represent, depend upon the law of the State; but the relation between executor and testator is altogether different. The executor's interest in the tes-

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tator's estate, is what the testator gives him. That of an administrator is only that which the law of his appointment enjoins. The testator may make the trust absolute or qualified in respect to his estate. It may be qualified as to the subject-matter, the place where the trust shall be discharged, and the time when the executor shall begin and continue to act as such. He may be executor for one or several purposes,—for a part of the effects in possession of the testator at the time of his death, or for such as may be in action, if it be only for a debt due. But though the executor's trust or appointment may be limited, or though there are several executors in different jurisdictions, and some of them limited executors, they are, as to the creditors of the testators, executors in privity, bearing to the creditors the same responsibilities as if there was only one executor. The privity arises from their obligations to pay the testator's debts, wherever his effects may be, just as his obligation was to pay them. The executor's interest in the testator's estate, is derived from the will, and vests from the latter's death, whatever may be the form which the law requires to be observed before an executor enters upon the discharge of his functions. When within the same political jurisdiction, however many executors the testator may appoint, all of them may be sued as one executor for the debts of the testator, and they may unite in a suit to recover debts due to their testator, or to recover property out of possession.

All of them, then, having the same privity with each other and to the testator, and the same responsibility to creditors, though they may have been qualified as executors in different sovereignties, an action for a debt due by the testator, against any one of them in that sovereignty where he undertook to act as executor, places all of them in one relation concerning it, and as to the remedies for its recovery; what one may plead to bar a recovery, another may plead; and that which will not bar a recovery against any of them, [*467] applies to all of them. Between administrators * deriving their commissions to act from different political jurisdictions, there is no such privity. This court has treated of this fully in two cases; in the case of *Aspden and others v. Nixon and others*, 4 How. 467, and in *Stacey v. Thrasher*, 6 How. 44. We refer to the former without citing any part of it, but it is full upon the point, and may be instructively read. But we shall cite a passage from *Stacey v. Thrasher*, on account of its appropriateness to what has just been said in respect to the want of privity between administrators deriving their powers in different jurisdictions.

"An administrator under grant of administration in one State, stands in none of these relations — of privity — to another adminis-

trator in another State. Each is privy to the testator, and would be estopped by a judgment against him, but they have no privity with each other in law or estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is administrator to the ordinary from which he receives his commission. Nor does the one come by succession to the other into the trust of the same property, incumbered by the same debts, as in the case of an administrator *de bonis non*, who may truly be said to have an official privity with his predecessor in the same trust, and therefore liable to the same duties." In that case, as a consequence of such reasoning, it was determined that an action of debt will not lie against an administrator in one of the United States, on a judgment obtained against a different administrator of the same intestate, appointed under the authority of another State.

For the same reasons, notwithstanding the privity that there is between executors to a testator, we do not think that a judgment obtained against one of several executors, would be conclusive as to the demand against another executor, qualified in a different State from that in which the judgment was rendered. But such a judgment may be admissible in evidence in a suit against an executor in another jurisdiction, for the purpose of showing that the demand had been carried into judgment in another jurisdiction, against one of the testator's executors, and that the others were precluded by it from pleading prescription or the statute of limitations upon the original cause of action. Such is the case certainly in Louisiana, as may be seen from the case of *Jackson v. Tiernan*, in 15 Louis. Rep. 485. The supreme court of that State, speaking by Judge Martin, says, that the plea of prescription cannot prevail in behalf of one joint debtor, if a suit has been brought against another in the circuit court of the United States for the district of Maryland, meaning thereby, we presume, if it had been commenced in any * other court in the United States. When, then, the court [* 468] below rejected, as inadmissible in evidence in this case, the judgment obtained in Virginia against Allen and Johnson, the executors of Robinson in that State, we think it erred, and that it should have been admitted for the purposes mentioned. The court also instructed the jury, that the causes of action in this suit against Tucker, the co-executor of Allen and Johnson, were barred by prescription. In this we think there was error. The article of her code upon which that instruction was given, 3,505, is in these words: "Actions on bills of exchange, notes payable to order or bearer, except bank notes, those of all effects negotiable or transferable by in-

dorsement or delivery, are prescribed by five years, reckoning from the day when these engagements are payable." It is not applicable to either of the causes of action set out in the plaintiff's petition. It is not so to Cheatham's note, indorsed by Robinson, because, being carried into judgment in Robinson's lifetime, it estops all his executors anywhere, from denying it, and obliges them to pay it out of his assets, wherever they may be. So it would be if, instead of executors, they were administrators in different States, as was said in Stacey and Thrasher's case, that each administrator is privy to the testator, and would be estopped by a judgment against him. The prescription of Louisiana, also, is not applicable to the due-bill given by Robinson to Wilkinson, for \$575, or to that for \$200 for money borrowed from Wilkinson, neither of them being negotiable by the law of Virginia, or by the law of Louisiana, and therefore not within the article of prescription. For the same reason it is not applicable to the judgment obtained by Dandridge for \$200, for overseer's wages due by Robinson, and which was assigned to Wilkinson. In this view of the case, we shall direct the judgment given by the court below to be reversed, and that the case shall be remanded for further proceeding, in conformity with this opinion.

13 H. 649.

CHARLES P. GOODALL, Plaintiff in Error, v. JOSEPH W. TUCKER,
Executor of ABNER ROBINSON, deceased.

13 H. 469.

The preceding decision applied to this case.

ERROR to the circuit court of the United States for the eastern district of Louisiana.

WAYNE, J., delivered the opinion of the court.

This cause was tried by the judge without a jury, and the legal propositions raised by counsel in the course of the trial were decided by him, to which exceptions were taken, as if they had been instructions to a jury.

The cause of action is the following single bill, which was executed at Richmond, in Virginia:—

"On demand, we, Abner Robinson, Isham Puckett, and J. P. Wilkinson, promise to pay to Charles P. Goodall, his executors or administrators, the sum of four thousand nine hundred and twenty-six dollars and twenty-seven cents, (\$4,926.27,) lawful money of these United States, for the faithful performance of which promise we bind

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ourselves, our heirs, executors, administrators, and assigns, as witness our hands and seals, this 6th day of September, 1839.

ABNER ROBINSON, [Seal.]

ISHAM PUCKETT, [Seal.]

JAMES P. WILKINSON." [Seal.]

It may as well be here stated, that it was proved upon the trial that Wilkinson and Puckett were sureties, and that the debt had been reduced to \$1,432, with interest from the 1st January, 1846.

In October, 1842, Goodall brought suit in the Henrico county court against the three obligors. Robinson was too ill to attend to the process, and afterwards died. The suit was prosecuted to judgment against Wilkinson in March, 1843, and abated as to the other defendants.

Execution was awarded upon the judgment, and a return made "no effects found."

In February, 1848, Goodall filed his petition against Tucker in the circuit court of the United States for Louisiana, alleging the above facts; when the same proceedings took place which are mentioned in the case of Catharine Hill.

*There is a good deal of documentary evidence in the [*470] record which we shall not notice, as it does not in any way affect the decision which should have been given upon the prayers of the plaintiff. See preceding case of *Hill v. Tucker*, 13 How. 458.

Those prayers were, with the defendant prayers, as follows:—

"After the evidence was offered the plaintiff asked the court to decide, as if instructing a jury upon the evidence.

1. That if the testator, Robinson, by his will, left four executors, that Joseph Allen and W. R. Johnson, citizens of Virginia, were two of those executors; and if they only qualified in Virginia, in the county of the domicil of the testator; and if the plaintiff, upon a valid and subsisting cause of action, instituted suit in the Henrico county court, in Virginia, against the only executors of the testator who had qualified; and if the plaintiff had obtained judgment regularly in that court, and it was a court of competent jurisdiction to hear and determine said cause; and if the plaintiff, having thus obtained judgment against the only qualified executors of the domicil of the decedent, regularly issued his execution on that judgment, and had thereon a return by the sheriff of *nulla bona*; and if the defendant was also an executor of the same testator appointed by the same will, and, as such, had taken upon himself the execution of said will according to the laws of Louisiana, where he resided; and if, as executor of Robinson, the defendant has ample estate of his testator in his hands to

pay the debts; and if all these facts are proven and established by the evidence, that then the plaintiff is entitled to recover judgment against the defendant for the amount of the judgment against the executors who qualified in Virginia.

2. That the exemplification of the record and the judgment obtained by the plaintiff against the executors, Allen and Johnson, and the return of *nulla bona* thereon, are evidence against the defendant, a co-executor in Louisiana.

3. That co-executors, unlike co-administrators, are privies in estate, because they derive the same privities over the same estate from the same will; and that under the will of Robinson, which was read, and the proofs of the qualification which were offered in this case, the plaintiff is entitled to recover against the defendant the amount of the judgment obtained by him against the only acting executors of the domicile of the decedent.

4. That if the plaintiff is not authorized to recover against the defendant on the mere production of the record of the judgment against his co-executors in Virginia, who alone made probate of the will there, and qualified, that he is entitled to recover on proving that the original cause of action on which that judgment was founded, [*471] was a just, valid, and subsisting demand *against the testator Robinson, and the additional fact that the estate in the hands of the executors of the domicile of the testator in Virginia, was exhausted, and that the defendant or co-executor has ample estate in his hands in Louisiana.

5. That independent of the record of the judgment in Virginia, the plaintiff has a right to recover against the defendant as executor of Robinson, upon the bond filed and proven, the amount of the balance due on that bond.

6. That the original cause of action on which the judgment in the Henrico county court is established and proven, and a recovery thereon, is not barred by the prescriptive laws of Louisiana.

7. That upon all the evidence offered, the plaintiff is entitled to a judgment in his favor.

8. That the suit in Virginia against the co-executor was a judicial interpellation, which would stop the running of prescription against the demand which was the cause of action in that suit. All of which the court overruled, and the plaintiff excepted.

And upon the facts proven, the defendant asked the court to decide: 1. That the Virginia judgment against the co-executors was not evidence against the defendant. 2. That the original cause of action on which that judgment was rendered, was barred as to the defendant by prescription. And, 3. That upon the whole evidence,

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the defendant was entitled to judgment in his favor. To all which plaintiff objected, and the court overruled his objections, and gave the decisions as asked by defendant; and to these several opinions plaintiff excepted.

And the defendant objected to each and all of said propositions, and the court sustained severally the objections of defendant, and refused to decide any one of said propositions as asked by the plaintiff. To each of which several opinions and decisions the plaintiff at the time excepted."

The court in sustaining the latter has erred.

We think that all of the prayers for the plaintiff were properly made, and that conjointly they make an issue decidedly in his favor. See opinion in case of *Hill v. Tucker*, 13 How. 458.

We shall not notice them more particularly than to say, that the suit upon the bond in Virginia, was a judicial interpellation, which stopped the Louisiana prescription from running against the cause of action in that suit and in this suit.

Further, the record shows that this suit was brought in Louisiana within the time that its law fixes for prescribing actions upon such a demand.

The judgment is reversed, and the case will be remanded for further proceedings, in conformity with this decision.

JEROME B. PILLOW, Plaintiff in Error, v. TRUMAN ROBERTS.

13 H. 472.

The impression of a seal upon paper, sufficiently clear to be recognized, is a valid legal seal. Under the law of Arkansas, a deed, made by a collector of taxes, and acknowledged and recorded, is evidence of the validity of the collector's proceedings.

An entry under a deed from a tax collector, and possession of the land described in the deed, is sufficient evidence of an adverse seisin under a statute of limitations.

By the law of Arkansas, five years' possession under an invalid deed from a tax collector, is a bar to an action by the true owner.

ERROR to the circuit court of the United States for the eastern district of Louisiana. The case is stated in the opinion of the court.

Lawrence and Pike, for the plaintiff.

Crittenden, (attorney-general,) *contra*.

GRIER, J., delivered the opinion of the court.

Roberts, the defendant in error, was plaintiff below, in an action of ejectment for 160 acres of land. Pillow, the defendant be-

low, pleaded the general issue, and two special pleas. The first, setting forth a sale of the land in dispute, for taxes more than five years before suit brought. The second, pleading the statute of limitation of ten years. These pleas were overruled on special demurrer, as informal and insufficient; and the judgment of the court on this subject is here alleged as error. But as the same matters of defence were afterwards offered to be laid before the jury on the [*473] trial of the general issue, and overruled *by the court, it will be unnecessary to further notice the pleas; as the defence set up by them, if valid and legal, should have been received and submitted to the jury on the trial. In the action of ejectment, (with the exception, perhaps, of a plea to the jurisdiction,) any and every defence to the plaintiff's recovery may be given in evidence under the general issue. And as the decision of the court on the bills of exception will reach every question appertaining to the merits of the case, it will be unnecessary to decide whether those merits were sufficiently set forth in the special pleas, to which the defendant was not bound to resort for the purpose of having the benefit of his defence.

On the trial, the plaintiff below gave in evidence a patent for the land in dispute, from the United States to Zimri V. Henry, dated 7th May, 1835; and then offered a deed from said Henry to himself, dated 10th November, 1849. This deed purported to be acknowledged before the clerk of the circuit court of Walworth county, in the State of Wisconsin, and was objected to, 1. Because there was no proof of the identity of the grantor with the patentee other than the certificate contained in the acknowledgment. 2 Because the certificate of acknowledgment was not on the same piece of paper that contained the deed, but on a paper attached to it by wafers. And, 3. Because the seal of the circuit court authenticating the acknowledgment, was an impression stamped on paper, and not "on wax, wafer, or any other adhesive or tenacious substance."

The first two of these grounds of objection have not been urged in this court, and very properly abandoned as untenable. The third has been insisted on, and deserves some more attention. Formerly, wax was the most convenient, and the only material used to receive and retain the impression of a seal. Hence it was said: *Sigillum est cera impressa; quia cera, sine impressione, non est sigillum.* But this is not an allegation, that an impression without wax is not a seal. And for this reason courts have held, that an impression made on wafers or other adhesive substance capable of receiving an impression, will come within the definition of "*cera impressa.*" If, then, wax be construed to be merely a general term including within it any substance capable of receiving and retaining the impression

of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine, now used to impress public seals, does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident, or intention, than that made on *wax. It [* 474] is the seal which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it. In Arkansas, the presence of wax is not necessary to give validity to a seal; and the fact that the public officer in Wisconsin had not thought proper to use it, was sufficient to raise the presumption that such was the law or custom in Wisconsin, till the contrary was proved. It is time that such objections to the validity of seals should cease. The court did not err, therefore, in overruling the objections to the deed offered by the plaintiff.

After the plaintiff had closed his testimony, the defendant offered in evidence two certain deeds from Miller Irwin, sheriff of Phillips county, and assessor and collector of taxes therein, to Richard Davidson, dated on the 22d of October, 1844; one for the north half, and the other for the south half of the quarter section of land now in dispute. On objection, the court refused to permit these deeds to be received, and sealed a bill of exceptions. The defendant then offered the same deeds to Davidson, and, in connection therewith, a deed from Davidson to Armstrong, and also a deed from Armstrong to the defendant; and to accompany them with proof of possession by himself and those under whom he claims, for more than ten years, as to the south half of said land, and more than five years as to the whole of it. The plaintiff objected to this evidence. "And it was by the court ruled, that the possession of such deeds, accompanied by possession of the land, was not sufficient to prove such possession of the land to be adverse to the plaintiff and his grantor without further proof that the defendant or his grantors claimed adversely; so the court refused to permit any deeds to be read in evidence to the jury."

These bills of exception may be considered together. They present two questions; 1. Whether, by the law of Arkansas, the deeds offered in evidence, (and which were regularly acknowledged and recorded according to law,) should have been permitted to go to the jury as evidence of a regular sale of the land mentioned therein for taxes. And, 2. Whether, without regard to their validity as elements of a good legal title *per se*, they should not have been received for the purpose of showing color of title, in connection with pos-

session by the persons claiming under them, for a length of time sufficient by law to bar the entry of plaintiff.

1. In considering these questions, it will not be necessary to set forth at length all the provisions of the revenue laws of Arkansas for compelling the payment of taxes assessed on land. A brief [*475] recapitulation of their most prominent provisions will suffice. These laws make it the duty of the collector, on or before the 15th of September of each year, to make a list of lands assessed to persons non-resident, and the tax due thereon, with a penalty or addition of 25 per cent., and to file this list with the county clerk. He is directed, also, to set up a copy of the same at the court-house, and to publish it in a newspaper at least four weeks before the first Monday of November, giving notice that unless the taxes shall be paid on or before that day, the land will be sold. On that day, the collector is authorized to offer for sale, at public auction, such tracts or lots of land, or so much of them as will be sufficient to raise the taxes and penalty assessed and unpaid, and to continue the sales from day to day. The purchaser to pay down forthwith the amount of taxes, &c., and receive a certificate describing the land purchased, directing, if necessary, the public surveyor to lay off the part purchased by metes and bounds after one year allowed for redemption. This certificate, which is made assignable, may be presented to the collector, who is authorized to execute and deliver a deed to the holder of it for the land described therein. Then follows the 96th section of the act, which is as follows :—

“ The deed so made by the collector shall be acknowledged and recorded as other conveyances of lands, and shall vest in the grantee, his heirs, or assigns, a good and valid title both in law and equity, and shall be received in evidence in all courts of this State as a good and valid title in such grantee, his heirs, or assigns, and shall be evidence of the regularity and legality of the sale of such lands.”

The deeds offered in evidence were regularly acknowledged and recorded. It is not denied that Irwin, the grantor therein, was sheriff, assessor, and collector of taxes in the county of Phillips, as he is described in the deed. The deed for the south half recites an assessment of the same for taxes in 1839, according to law ; that the taxes remained unpaid ; that the land was regularly advertised and offered for sale on the 5th of November, 1839, by auction ; struck down to William Vales, who paid the purchase-money and received a certificate ; that the time for redemption having long expired, and Richard Davidson become the assignee or holder of the certificate ; therefore, the said collector granted, &c., the said south half to said Davidson, his heirs, &c.

The deed for the north half has similar recitals, showing a tax assessed in 1840, a sale in 1841, to John Powell, and a certificate transferred by him to Davidson.

These deeds come within the description of the 96th section. They are made by a collector of the revenue; they are acknowledged and recorded according to law; they purport to be for *land assessed for taxes, and regularly sold according to [* 476] law; and the law enacts that deeds, so made, shall be evidence not only of the grant by the collector, but of the regularity and legality of the sale of the land described therein.

It is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed. We might say that the expression, "deeds so made by the collector," means deeds made strictly according to the requirements of all the preceding sections of the revenue law, and decide that only deeds first proved to be completely regular and legal can be received in evidence; and thus, by qualifying the whole section by such an enlarged construction of these two words, and disregarding all the others, evade the obvious meaning and intention of the law. For if you must first prove the sale to be regular and legal before the deed can be received, what becomes of the provision that the deed itself shall be evidence of these facts? Such a construction annuls this provision of the law, and renders it superfluous and useless. The evil plainly intended to be remedied by this section of the act, was the extreme difficulty and almost impossibility of proving that all the very numerous directions of the revenue act were fully complied with, antecedent to the sale and conveyance by the collector. Experience had shown, that where such conditions were enforced, a purchaser at tax sales, who had paid his money to the government, and expended his labor on the faith of such titles in improving the land, usually became the victim of his own credulity, and was evicted by the recusant owner or some shrewd speculator. The power of the legislature to make the deed of a public officer *prima facie* evidence of the regularity of the previous proceedings, cannot be doubted. And the owner who neglects or refuses to pay his taxes or redeem his land, has no right to complain of its injustice. If he has paid his taxes, or redeemed his land, he is, no doubt, at liberty to prove it, and thus annul the sale. If he has not, he has no right to complain if he suffers the legal consequences of his own neglect.

The plain and obvious intention of the legislature is clearly expressed in this 96th section, that the deed made by a collector of taxes, as authorized in the preceding section, when acknowledged and recorded, should be received in evidence as a good and valid title, and

that the recitals of the deed showing that it was made in pursuance of a sale for taxes, should be evidence of the regularity and legality of the sale under and by virtue of that act. The deed being thus made, *per se*, *prima facie* evidence of a legal sale and a good title, the court were bound to receive it as such. There is nothing on the face of these deeds showing them to be irregular or void. [* 477] They are each for a different * portion of the tract or quarter section of land, having known boundaries, according to the plan of the public surveys; one being for the south half and the other for the north half of the quarter section, it required no survey to ascertain their respective figure, boundaries, or location.

2. But, assuming these deeds to be irregular and worthless, the court erred in refusing to receive them in evidence, in connection with proof of possession, in order to establish a defence under the statutes of limitation.

The first section of the act of limitations of Arkansas bars the entry of the owner after ten years. And the thirty-fifth section enacts that "all actions against the purchaser, his heirs, or assigns, for the recovery of lands sold by any collector of the revenue for the non-payment of taxes, and for lands sold at judicial sales, shall be brought within five years after the date of such sales, and not after."

Statutes of limitation are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction. The possession which is protected by them must be adverse and hostile to that of the true owner. It is not necessary that he who claims their protection should have a good title, or any title but possession. A wrongful possession, obtained by a forcible ouster of the lawful owner, will amount to a disseisin, and the statute will protect the disseisor. One who enters upon a vacant possession, claiming for himself upon any pretence or color of title, is equally protected with the forcible disseisor. Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence, color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and, of course, adversely to all the world. A person in possession of land, clearing, improving, and building on it, and receiving the profits to his own use, under a claim of title, is not bound to show a forcible ouster of the true owner, in order to evade the presumption that his possession is not hostile or adverse to him. Color of title is received in evidence for the purpose of showing the possession to be adverse; and it is difficult to apprehend why evidence offered, and competent to prove that fact, should be rejected till the fact is otherwise proven.

With regard to the five years' limitation, we need not inquire whether the legislature intended that the action should be barred where the purchaser at the tax sale was not in possession. In this case, possession for more than five years by the purchaser from the collector and those claiming under him, was proved. In order to entitle the defendant to set up the bar of this statute, *after five years adverse possession, he had only to show [* 478] that he and those under whom he claimed, held under a deed from a collector of the revenue, of lands sold for the non-payment of taxes. He was not bound to show that all the requisitions of the law had been complied with, in order to make the deed a valid and indefeasible conveyance of the title. If the court should require such proof before a defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute before he could be entitled to it. Such a construction would annul the act altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his tax title. The case of *Moore v. Brown*, 11 How. 424, had reference to a deed void on its face, and the consequence of this fact, under the peculiar statutes of Illinois; it furnishes no authority for the decision of the court below in the present case.

The judgment of the circuit court is therefore reversed, and a *venire de novo* ordered.

18 H. 50, 137; 21 H. 831.

THE UNITED STATES, Plaintiffs in Error, v. ANDREW HODGE, JR.,
and LEVI PIERCE.

13 H. 478.

Under the 8th and 15th sections of the act of July 2, 1836, (5 Stats. at Large, 81, 82,) transcripts of the quarterly returns of a postmaster, as corrected by the auditor, and of the accounts based thereon, are admissible in evidence in an action against the postmaster and his sureties on his official bond, though credits claimed by him and rejected, do not appear in such accounts.

THE case is stated in the opinion of the court.

Crittenden, (attorney-general,) for the plaintiffs.

Johnson and *May*, contra.

* DANIEL, J., delivered the opinion of the court. [* 479]

This case comes before us upon a writ of error, to the circuit court of the United States for the eastern district of Louisiana.

The plaintiffs in error instituted in the circuit court an action at

law against the defendants, to recover the sum of twenty-five thousand dollars, the penalty of a bond executed by those defendants with W. H. Ker, and by which the obligors bound themselves jointly and severally for the faithful performance by Ker, of the duties of postmaster at New Orleans. The amount claimed by the United States, upon the statement of the account of the postmaster, at the treasury department, was, on the 18th of August, 1839, \$70,126.72, nearly three times the penalty of the bond.

This cause was first tried in the circuit court in February, 1843, when, under a charge from the judge, the jury found a verdict for the defendants. A writ of error was sued out to the judgment of the court, but was afterwards dismissed here for the irregularity that it was signed by the clerk of the court and not by the judge. *Vide* 3 How. 534. Upon a new writ of error, the case was brought up to this court, was heard upon exceptions to the rulings of the judge, when the decision of the circuit court was reversed, and the cause remanded for trial upon a *venire facias de novo*. 6 How. 279.

In pursuance of the mandate of this court, the cause coming on to be finally heard in the circuit court on the 8th of May, 1851, the judge refused to allow any of the statements of the accounts with the postmaster, or any of the transcripts from the post-office department, relating to the accounts of the postmaster, or any of the monthly returns of that officer which were offered in evidence by the plaintiffs to be read to the jury, but excluded the whole of them,

whereupon the jury found a verdict for the defendants. The [* 480] case is now before us upon exceptions * to the rulings of the judge, and which exceptions are as follows:—

“Be it remembered that, on the trial of this case, the attorney of the United States, after having read in evidence the bond sued on, offered in evidence the following certified transcripts of statement of accounts, copies of quarterly returns of W. H. Ker, late postmaster, and of the other papers pertaining to the account of the said postmaster, hereto annexed; to the introduction of which, as evidence, the defendants, by their counsel, objected, and the court sustained the objection, and refused to allow the said transcripts, or any of them, to be read in evidence to the jury; to which opinion and decision of the court, in excluding said evidence, the attorney of the United States excepts and prays that this bill of exceptions may be signed, sealed, and made matter of record, which is done accordingly.

“THEO. H. McCALIB, U. S. Judge.” [SEAL.]

By consent of the counsel of the United States, the court here states the grounds upon which it rejected the transcripts above mentioned as follows:—

"1. That the said statement of accounts, between the United States and said W. H. Ker [were] as audited and adjusted only, and did not purport to contain the statement of credits claimed by him, and disallowed, in whole or in part, by the officers of the government.

"2. That the items charged to the said W. H. Ker in said accounts, prior to the year 1836, as balances of quarterly returns, do not purport on the face of said accounts to be balances acknowledged by him, nor are they supported by any proper vouchers, but merely purport to be the balances of said quarterly returns, as audited and adjusted by the officers of the government.

"3. That the quarterly returns were not the basis of the action, and under the law could not be admitted as evidence before the jury, except as vouchers to sustain the account, (which) having been rejected by the court, the quarterly returns could not be given in evidence without it.

THEO. H. McCaleb, U. S. Judge."

In order to test the accuracy of the decision by which the competency and legal effect of the transcripts were passed upon by the court, and by which they were ruled out at the trial, some reference will be proper to the statutes by which those documents have been authorized and directed, and the mode of their application prescribed in the prosecution of claims on behalf of the government. By the 8th section of the act of congress for the reorganization of the post-office department, passed on the 2d of July, 1836, (*vide* Stats. at Large, vol. 5, p. 81,) it is provided "that there [* 481] shall be appointed by the President, with the advice and consent of the senate, an auditor of the treasury for the post-office department, whose duty it shall be to receive all accounts arising in said department, or relative thereto, to audit and settle the same, and to certify their balances to the postmaster-general. He shall keep and preserve all accounts, with the vouchers, after settlement; he shall promptly report to the postmaster-general all delinquencies of postmasters in paying over the proceeds of their offices, and shall close the accounts of the department quarterly, and transmit to the secretary of the treasury quarterly statements of the receipts and expenditures."

By section 15, of the same statute, vol 5, p. 82, it is further provided: "That copies of the quarterly returns of postmasters, and of any papers pertaining to the accounts in the office of the auditor for the post-office department, certified by him under his seal of office, shall be admitted as evidence in the courts of the United States; and in every case of delinquency of any postmaster or contractor, in which suit may be brought, the said auditor shall forward to the attorney of the United States, certified copies of all papers in his office tending

to sustain the claim ; and in every such case a statement of the account certified as aforesaid, shall be admitted as evidence ; and the court trying the cause shall be thereupon authorized to give judgment and award execution, subject to the provisions of the 38th section of the act to reduce into one the several acts establishing the post-office department, approved March 3, 1825." ¹ The 38th section of the act of 1825, here referred to, relates exclusively to the conditions on which the court may grant a continuance to defendants, beyond the return term, in suits against them. The 15th section of the act of 1836, goes on further to declare : " That no claim for a credit shall be allowed upon the trial, but such as shall have been presented to the said auditor, and by him disallowed in whole or in part, unless it shall be proved to the satisfaction of the court that the defendant is at the time of the trial in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said auditor by some unavoidable accident."

In the case before us there were exhibited, on the trial below, two general accounts or transcripts from the auditor for the post-office department with the postmaster Ker. By the former of these accounts, the balance against the postmaster was stated at \$93,347.78 ; by the latter, the balance was reduced to the sum of \$70,126.96. The difference in these amounts is explained by the facts, that at the time at which the first statement was made, the postmaster had [* 482] failed to make his quarterly returns as * required by law, from the 1st of July to the 15th of November, 1839, and in consequence of that failure had been charged, in pursuance of the 32d section of the act of congress of 1825, with double the estimated amount of postages receivable during that interval. Subsequently to this statement, the postmaster having rendered his account for the interval above mentioned, the actual amount due from him was charged against him in lieu of the duplicated estimate of receipts, and the balance against him thereby reduced to the sum of \$70,126.96. The transcript of the statement thus corrected, was certified to the circuit court on the 11th of May, 1842, before the trial of the cause.

In addition to these general transcripts, there were certified by the auditor, and tendered in evidence by the United States, copies of the quarterly accounts or returns rendered by the postmaster from the quarter ending on the 30th of September, 1836, before the execution of his official bond sued on, up to the period of his removal ; and on each of these quarterly returns or accounts, the corrections or disallowances are noted. Proof is found in the record of notice to the postmaster of all these corrections in his returns, and the balances

¹ 4 Stat. at Large, 113.

claimed on each of these returns as corrected, were afterwards carried into the auditor's general statements, of which transcripts were furnished and offered in evidence at the trial. It would seem difficult to discover a plausible reason for the exclusion by the judge at circuit of the transcripts offered in evidence, as incompetent or irrelevant to the issue before him, and equally so to reconcile the reason assigned by his honor with the conclusion to which it has led him. In the first place, the language of the act of congress is express and imperative, that the "auditor of the treasury for the post-office department shall receive all accounts arising in the department relative thereto, and audit and settle the same, and certify their balances to the postmaster-general." *Vide* section 8 of the act of 1836. And again, section 15 of the same act: "In every case of delinquency of any postmaster or contractor in which suit may be brought, the said auditor shall forward to the attorney of the United States, certified copies of all papers in his office tending to sustain the claim; and in every such case, a statement of the account, certified as aforesaid, shall be admitted as evidence; and the court trying the cause shall be thereupon authorized to give judgment and award execution," &c. The competency of a statement by the auditor, of all or any accounts with postmasters and contractors in suits against them, cannot, then, be questioned; the accuracy of such statements as to detail, is a wholly different matter, and is to be questioned or contested in the mode prescribed by other provisions of the *statute. [* 483] The only qualification ever made of the principle above laid down, if indeed it can be properly considered a qualification, is to be found in the decisions of this court in the cases of *The United States v. Buford*, 3 Pet. 29, and of *The United States v. Jones*, 8 Pet. 375, in which it has been ruled that transcripts from the treasury should not amount to proof of facts, not coming within the regular relation existing between the department and persons with respect to whom such facts may have transpired; but this exception or qualification cannot apply to transactions falling strictly within the relation subsisting between the government and its agents, or rather it goes to affirm the operation of the statute in reference to such transactions. The utmost latitude which could be given to the decisions above mentioned, could not extend them to the entire character of the transcripts certified from the department as evidence, but must limit their effect to any portions or items of those transcripts which should be irregular, and not within the language or import of the statute, nor within the regular operations of the department.

The first reason assigned by the judge below for excluding the entire transcripts is, that they were presented as accounts between the

United States and the postmaster Ker, as audited and adjusted only and did not purport to contain the statement of credits claimed by him, and disallowed in whole or in part by the officers of government. The obvious answer to this objection is, that the omission complained of did not render those documents any the less transcripts, certified by the officer, nor destroy their competency as evidence under the statute. The objection, if it comprise either force or plausibility, is one strictly applicable to the completeness or sufficiency of the documents offered, and not to their competency or legality. An objection to the transcripts from the department, founded on the facts that they are only a statement and adjustment of the accounts between the United States and the postmaster, without containing the credits claimed and disallowed, is precisely an objection based upon the conformity of those documents with the law; for, by the 8th section of the act of 1836, the auditor is directed to receive all accounts arising in the department or relative thereto, to audit and settle the same, and to certify the balances therein to the postmaster-general — and we may seek in vain for any provision in the statute which prescribes a particular form of stating the accounts or directing a list of the items not admitted by the department, but rejected as illegal, to be made parts of that general account, or transcript. A different proceeding would seem to have been the contemplation of the legislature, if we

can gather its intention from the mode pointed out for pre-
[* 484] ferring * and establishing credits, which, if denied and rejected by the government, it would seem strange to require should, by the act of that government which denied their existence, be held forth as a part of its own view of the transaction. But, as already observed, the reason assigned by the judge of the circuit court for ruling out the transcripts, is one which could apply, in any view, only to the sufficiency or strength of the proof, and not to the competency or relevancy thereof. That reason, too, is directly in conflict with the 15th section of the act of 1836, which explicitly declares, irrespective of their force or efficiency: "That copies of the quarterly returns of postmasters, and of any papers pertaining to the accounts in the office of the auditor of the post-office department, certified by him under the seal of his office, shall be admitted as evidence in the courts of the United States; and in every case of delinquency by any postmaster or contractor, in which suits may be brought, the said auditor shall forward to the attorney of the United States, certified copies of all papers in his office, tending to sustain the claim, and in every such case a statement of the account, certified as aforesaid, shall be admitted as evidence." Under this ample provision of the statute, not only the statements of accounts, but

certified copies of every paper in the department pertaining to such accounts, are made competent evidence in the courts of the United States.

It will be observed, in this case, that in the certified transcripts from the department, every credit allowed to the postmaster upon the settlement of his account is given, and appears upon the face of the transcripts, so that the defendants have received the full benefit of all such credits; and indeed the opinion of the judge below is not founded on the withholding of any of these credits from the postmaster, but it rests exclusively upon the fact of the absence from the face of the transcripts or general accounts of the alleged credits, whose correctness, or legal existence even, was denied by the government, but which the defendant was still at liberty to assert in the mode prescribed by the statute. What obligation there could be upon the government to embody and to present to the court claims whose existence it repudiated and denied, we are unable to perceive. The language of the statute contains no such requisition, and none such appears to fall within the meaning or objects of the law. Upon each of the quarterly returns of the postmaster, the corrections made at the department are noted in a separate column, annexed thereto for the sole purpose of inserting those corrections; the balances, as corrected, were thence transferred to the general accounts or transcripts, and the postmaster was informed of the corrections made, with the view to his sustaining the rejected *items [* 485] by proofs, if in his power to do so. The quarterly returns themselves remaining as to all the items they contained, precisely as made by the postmaster himself.

The question of the admissibility and competency of transcripts like those ruled out by the judge in the court below, has, in several instances, received the examination of this court, and their competency and legality as evidence, in cases like the present, have been established upon the fullest consideration. In the case of *Hoyt v. The United States*, 10 How. 109, this question was raised, and in the investigation of it by this court, the cases of *The United States v. Buford*, 3 Pet. 29; *The United States v. Jones*, 8 Pet. 375; and *The United States v. Eckford's Executors*, 1 How. 250, were all examined and compared. It is true that the cases above mentioned did not arise upon the statute regulating the post-office department, but they involved the construction of the act of March 3, 1797, the import of which, and indeed the language thereof, *mutatis mutandis*, are identical with those of the act of 1836, regulating the post-office department. *Vide* 1 Stats. at Large, 512. In the case of *Hoyt v. The United States*, the law is thus expounded by this court: "The counsel for the plaintiffs, (*The United States*,) in the court below, produced on the trial

four treasury transcripts, containing a statement of the accounts of the plaintiff in error with the government, for the whole period of his term, and which resulted in the balance above stated. These transcripts were objected to as not competent evidence against the defendant of the balance therein found due, within the meaning of the act of congress providing for this species of proof. The second section of the act provides that in every case of delinquency where a suit has been brought, a transcript from the books and proceedings of the treasury, certified by the register and authenticated under the seal of the department, shall be admitted as evidence, upon which the court is authorized to give judgment." This court further proceeds: "In the case before us, the several items of account in the transcripts arise out of the official transactions of the defendant as collector, with the treasury department, and were founded upon his quarterly returns and other accounts rendered in pursuance of law and the instructions of the treasury. They were substantial copies of these quarterly returns revised and corrected by the accounting officer, as they were received, and with copies of which the defendant had been furnished, in the usual course of the department; they present a mutual account of debit and credit arising out of the official dealings with the government in the collection of the revenue. We can hardly conceive of a case, therefore, coming more directly within the act of congress as expounded by the cases referred to." The court then [*486] deduces the following conclusions: "As a general rule, therefore, every item of the account that can be the subject of litigation at the trial on the production of a transcript, must have been a matter of dispute at the treasury department, and of course presenting nothing new or unexpected to the parties. The court is of opinion, therefore, that the several treasury transcripts offered in evidence were properly admitted." We think, therefore, that the objection of the judge of the court below to the transcript offered in evidence, namely, that it did not contain on its face, as credits, items which were never admitted as credits, but were denied and rejected as such, was justified neither by the statute, nor by reason nor custom, in the statement of accounts.

The second cause assigned by the judge below for his rejection of the transcripts from the jury, is likewise one which applies, if at all, to the accuracy of the items in the account, and not to the competency of the entire transcripts as documents certified and attested in the mode prescribed by the act of congress. The objection on the part of the judge, if it can be apprehended, seems to be this: that the quarterly returns of the postmaster entering into, and forming parts of the general transcripts, having been corrected at the department,

the balances produced by such corrections cannot be regarded as the acknowledged amounts due by the postmaster, but, on the contrary, are the balances stated as due on said quarterly returns as audited and adjusted by the officers of the government. As we have already said, this objection applies entirely to the correctness of the items contained in the general account as stated, and cannot change the character of the transcripts as certified statements of the accounts audited and adjusted at the department, and as directed to be certified by the provisions of the statute. Moreover, these quarterly returns, which, so far as they go, are certainly admissions of the postmaster, are in nowise changed or affected, except by the disallowance of particular items, and by that very disallowance the officer is put in the position, and notified to sustain, if he can, his claims by legal proof. If he fail to do this, it can certainly furnish no reason why every other item of indebtedment admitted to be correct by both parties, should be withheld. We can perceive, then, no force in the second cause assigned by the judge below for the rejection of the transcripts.

The third cause assigned by the judge for rejecting the evidence tendered by the plaintiffs, has less of plausibility to sustain it than either which precedes it; and may be disposed of in a few words. This last cause begins with the affirmation, that the quarterly returns were not the basis of the action; next it asserts that these returns could not, under the law, be admitted as evidence to the jury, except as vouchers to sustain the account, * and then [*487] the conclusion attempted from these positions is, that the account being rejected by the court, the quarterly returns could not be given in evidence without it. A somewhat curious example of assumption is given in this argument of the court, and of deduction in the conclusion as drawn therefrom. In the first place, it may be observed that neither the transcripts nor the quarterly returns, certified from the department, constituted, properly speaking, the basis of the action against the defendants—that basis is found in the official bond of the postmaster and his sureties, and in the acts or delinquencies of the officer. The proof of those delinquencies consisted in part, as ordered by the statute, of the general transcripts, and of the quarterly returns certified and attested as that statute directed; they were both made evidence, and ought to have been so received, to avail as far as they regularly and properly might upon the issue made between the government and the defendants. They both came within the literal descriptions in the statute, of the “copies of quarterly returns of postmasters, and of any papers pertaining to the accounts in the office of the auditor of the post-office department, which, when certified by him under his seal of office, shall be admitted in evidence

in the courts of the United States." But the trenchant argument of the court below is simply this: I have cut off a portion of this statutory evidence, by the former part of my opinion, the residue shall be subjected to a like operation. We think that the decision of the circuit court, as a whole, and in the detail, as set forth by that court, is erroneous, and should be, as the same is hereby, reversed; and we do remand this cause to the circuit court to be again tried, subject to the principles laid down in this opinion.

CORNELIUS W. LAWRENCE, Plaintiff in Error, v. JOHN CASWELL and SOLOMON T. CASWELL.

13 H. 488.

Under the tariff act of July 30, 1846, (9 Stats. at Large, 42,) only the quantity of brandy imported, not that shown by the invoices, is dutiable; but as this act lays upon it an *ad valorem* duty, the allowance for leakage of two per centum of the quantity gauged, cannot be made under the 59th section of the collection act of 1799, (1 Stats. at Large, 672,) because that law applied only to liquors subject to duty by the gallon.

THE case is stated in the opinion of the court.

Crittenden, (attorney-general,) for the plaintiff.

Butler, contra.

[* 495] *TANEY, C. J., delivered the opinion of the court.

This is an action brought by the defendants in error against the collector of the port of New York, to recover certain sums of money alleged to have been illegally exacted as duties.

The defendants in error are merchants of New York, and imported a large quantity of brandy in the years 1847 and 1848, which were deposited in the public stores, under the warehouseing act of 1846.¹ Upon gauging these several importations, at the time of their arrival, the contents were found to be less than the quantity stated in the several invoices.

As the brandy was from time to time withdrawn by the importers, the collector demanded the duty of one hundred per cent. *ad valorem* upon the whole invoice quantity, and it was paid by the importers under protest.

The importers claimed in their protest that the duties should be computed upon the actual contents, as shown by the gauger's returns, after deducting two per cent. from such contents. And the court was of opinion, and so directed the jury, that this was [* 496] *the correct mode of ascertaining the duties; and a verdict was accordingly rendered and judgment given for the

¹ 9 Stats. at Large, 53.

amount overcharged. This writ of error is brought to revise that judgment.

Two questions arise in the case: 1st, whether the duty ought to be computed on the quantity stated in the invoices, or on the contents as ascertained by the gauger's returns; and 2dly, whether the two per cent. ought to have been deducted for leakage.

As relates to the first question, it is substantially the same with that decided by the court in the case of *Marriott v. Brune*, 9 How. 619. The duty of one hundred per cent. *ad valorem* was chargeable on the quantity of brandy actually imported, and not on the contents stated in the invoices. This overcharge was therefore illegally exacted, and the defendants in error were entitled to recover back the amount. The judgment of the circuit court is in this respect correct.

But it is proper to say, in order that the opinion of the court may not be misunderstood, that when we speak of duties illegally exacted, the court mean to confine the opinion to cases like the present, in which the duty demanded was paid under protest, stating specially the ground of objection. Where no such protest is made, the duties are not illegally exacted in the legal sense of the term. For the law has confided to the secretary of the treasury the power of deciding in the first instance upon the amount of duties due on the importation. And if the party acquiesces, and does not by his protest appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question.

Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case, in a higher and superior court, determined to have been an erroneous construction. But money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the secretary of the treasury, and without appealing from that decision to the judicial tribunals by a proper and legal protest. Nor are they within the principle decided by the court in the case before us.

We proceed to the second point—that is, to the claim of a further deduction of two per cent.

The revenue collection act of 1799, c. 22, § 59, under which it is claimed, provides: "That there shall be an allowance of two per cent. for leakage on the quantity which shall appear by the gauge to be contained in any cask of liquors subject to duty by the gallon."

At the time this law passed, brandy and sundry kinds of [* 497] wine were subject to a specific duty upon the gallon; but

various other wines were charged with an *ad valorem* duty, not to exceed in amount a certain rate per gallon, specified in the law. And as the two per cent, deduction was made to depend on the character of the duty, and not upon the nature of the liquor imported, the brandy and wines which then paid a duty by the gallon, were entitled to it—but the wines which paid an *ad valorem* duty were not entitled. The right to the allowance did not depend upon the fact that the importation consisted of brandy or wines of a particular description, but upon the duty to which the article was subject. If it was charged by the gallon, this deduction was to be made, but otherwise if charged *ad valorem*. Afterwards, by the act of May 13, 1800,¹ the *ad valorem* duties, which were before charged on certain kinds of wine, were changed to specific duties; and all wines were charged with duty by the gallon. And from the passage of this act until the act of 1846, all importations of liquors of any description paid a specific duty. This will account for the usage in the custom-house to allow the deduction on all liquors, as stated in the record. For, when the *ad valorem* duty on certain wines was changed to a duty by the gallon, these wines, like brandy and other wines, came within the provision in the act of 1799, and consequently were entitled to the two per cent. deduction.

So, also, when the act of 1846, changed the duty upon brandy from a specific one upon the gallon, to a duty *ad valorem*, it was no longer within the provision of the act of 1799, and consequently no longer entitled to the deduction of two per cent. The provision in the act of 1799 is not repealed; but brandy is not now within it, because it is not subject to a duty by the gallon.

It is said there is the same reason for allowing this deduction for loss by leakage, whether the duty is *ad valorem* or specific; and that it would be unjust to make any discrimination between them. But, without stopping to inquire whether this argument is well founded or not, or whether sufficient reasons may not be assigned for the difference, it is sufficient for the court to say, that the law makes the distinction. And it is not within the province of the treasury department or the court to decide upon the reasonableness or unreasonableness of a tariff which it is evident congress intended to impose. The words of the law are plain. And, since brandies do not pay a duty by the gallon, they are not entitled to the deduction of two per cent.

The judgment of the circuit court must, therefore, be reversed, with costs, and a mandate issued directing it to proceed to judgment upon the principles stated in this opinion.

Jecker v. Montgomery. 13 H.

JUAN BAUTISTA JECKER, LUIS JECKER, THOMAS DE LA TORRE, GEIDERO DE LA TORRE, and JOSE E. FERNANDEZ, Merchants, trading under the Name and Style of JECKER, TORRE AND COMPANY, Appellants, v. JOHN B. MONTGOMERY.— And JOHN B. MONTGOMERY, Appellant, v. JUAN BAUTISTA JECKER, LUIS JECKER, THOMAS DE LA TORRE, GEIDERO DE LA TORRE, and JOSE E. FERNANDEZ, Merchants, trading under the Name and Style of JECKER, TORRE AND COMPANY.

13 H. 498.

Neither the President, nor any inferior executive officer, can establish a court of prize, competent to take jurisdiction of a case of capture *jure belli*.

Though it is the duty of the captor, under the laws of nations affirmed by the act of congress, to send in captured property for adjudication by a court of his own country, having competent jurisdiction, yet he may be excused, by imperative circumstances, for making a sale of such property, and afterwards seasonably subjecting the proceeds to the jurisdiction of a proper court of prize.

The orders of the commander in chief, not to weaken his force by detaching an officer and crew for the prize; or his own deliberate and honest judgment, exercised in reference to all the circumstances, that the public service does not permit him to make such detachment, will excuse the captor from sending in his prize for adjudication.

If no sufficient excuse appear, or if the captor have unreasonably delayed to bring the question of prize or no prize to an adjudication, the court may refuse to proceed to an adjudication, and may award restitution, with or without damages, upon the ground of forfeiture of rights by the captor, although his seizure was originally lawful.

So if the captor should neglect to proceed at all, the court may, upon a libel filed by the owner, for a marine trespass, grant a monition to proceed to adjudication in a court of prize, or refuse it, and at once award damages.

In this case, the captor was held to have forfeited no rights, and an order to proceed in a court of prize, within whose jurisdiction were the proceeds of the sale of the property, was directed to be made by the circuit court.

THE case is stated in the opinion of the court.

Coxe and Nelson, for the appellants.

Key and Johnson, contra.

* TANEY, C. J., delivered the opinion of the court. [*512]

This case arises upon the capture of the ship *Admittance* during the late war with Mexico, by the United States sloop of war *Portsmouth*, commanded by Captain Montgomery.

The *Admittance* was an American vessel, and after war was declared, sailed from New Orleans with a valuable cargo, shipped at that place. She cleared out for Honolulu, in the Sandwich Islands; and was found by The *Portsmouth* at Saint Jose, on the coast of California, trading, as it is alleged, with the enemy.

Before this capture was made, a prize court had been established at Monterey, in California, by the military officer, exercising the func-

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tions of governor of that province, which had been taken possession of by the American forces. A chaplain, belonging to one of the ships of war on that station, was appointed Alcalde of Monterey, and authorized to exercise admiralty jurisdiction in cases of capture. The court was established at the request of Commodore Biddle, the naval commander on that station, and sanctioned by the President of the United States, upon the ground that prize crews could not be spared from the squadron to bring captured vessels into a port of the United States. And the officers of the squadron were ordered to carry their prizes to Monterey, and libel them for condemnation in the court above mentioned, instead of sending them to the United States.

In pursuance of this order, The Admittance was carried to Monterey, and condemned by the court as lawful prize; and the vessel and cargo sold under this sentence. The seizure at Saint [* 513] *Jose was made on the 7th of April, 1847, and the ship and cargo condemned on the 1st of June, in the same year.

The order of the President, authorizing the establishment of the court, required that the proceeds, arising from the sale of prizes, should not be distributed, until a copy of the record was sent to the navy department, and orders in relation to the prize-money received from the secretary. No order appears to have been given in this case, and it would be presumed, from the pleadings, that it is still in the custody of the commander of The Portsmouth. It has, however, been stated in the argument, and we understand is admitted, that the money was sent to the United States, and placed in the custody of the treasury department, where it still remains. But it is not material in this case to inquire, whether it is still in possession of Captain Montgomery, or in the custody of the secretary of the treasury. It could not, in either case, affect the decision. This is the case as it appears on the record, and admissions in the argument. It comes before the court on the following pleadings.

The claimants, on the 6th of June, 1848, filed a libel in the admiralty court for the District of Columbia, against the captor, stating that they were the owners of the cargo of The Admittance; that they were subjects of Spain, and neutrals in the war between this country and Mexico; that The Admittance sailed on a lawful voyage; that the vessel and cargo were seized at Saint Jose by Captain Montgomery as prize of war, without any lawful or probable cause; that the vessel and cargo were not brought to the United States, nor proceeded against as prize of war in any court having jurisdiction to adjudicate upon the lawfulness of the capture, but were unlawfully

sold and disposed of by Captain Montgomery, who thereby had put it out of his power to proceed to any lawful adjudication upon the legality of the capture, and had thus made himself a trespasser *ab initio*, independently of any lawful or probable cause for the original seizure. They pray, therefore, that he may be compelled to bring the cargo within the jurisdiction of the court, or of some other court of the United States, and institute proceedings against the property, and show that there was lawful or probable cause for the seizure, and have the same adjudicated upon by some court of the United States having full jurisdiction in the matter; and that restitution of the goods or the value thereof may be awarded to the libellants, with damages for the unlawful seizure.

Captain Montgomery appeared and answered, and admitted that, as commander of the United States ship Portsmouth, he seized and took The Admittance at Saint Jose as lawful prize; and justifies the seizure upon the ground that she sailed *from [* 514] New Orleans with the design of trading with the enemy; that she did in fact hold illegal intercourse with them, and discharged a part of her cargo at Saint Jose. And the respondent exhibits with his answer, and as a part of it, sundry papers received from Peter Peterson, the master of The Admittance, together with her log-book and the deposition of her mate.

The respondent further states that it was impossible for him, consistently with the public interests, to send The Admittance to any port of the United States; and that he carried her before the prize court hereinbefore mentioned, at Monterey, where she was condemned with her cargo as lawful prize; and exhibits the proceedings of that court as a part of his answer, and relies on this condemnation as a bar to the present proceedings on behalf of the claimants.

To this answer the libellants put in two demurrers.

1. To so much of the answer as relies upon the condemnation at Monterey as a bar.

2. To so much of the answer as relies upon the acts of the captain and crew of The Admittance as a justification for the seizure of the ship or cargo as lawful prize of war, or furnishing probable cause for seizure; and, as the ground for this demurrer, avers that the admiralty court for the District of Columbia had no jurisdiction to adjudicate upon the question of prizes or probable cause of seizure, as the property was not within its control, and could not be brought within it, in consequence of the sale in California. The respondent joined in these demurrers.

After these issues in law had been joined, the respondent, by leave

of the court, amended his answer, averring in the amendment that the libellants, at the time of the shipment at New Orleans, and at the time of the seizure, were domiciled in Mexico, and conducting a commercial establishment in that country; and also, that the libellants were the owners of only a small portion of the cargo. But there is no replication to this amendment, nor is it embraced in the issues of law made by the demurrers. The omission to dispose of it, however, forms no objection to this appeal, as the judgment of the circuit court was final, and disposed of the whole case, independently of these new allegations.

In this state of the pleadings, a decree was entered in the district court sustaining both of the demurrers, and directing the respondent to bring the cargo within the jurisdiction of some district court of the United States, and institute proceedings against it as prize of war, on or before the day mentioned in the decree; and that in default thereof the libellants should recover its value.

This decree was entered *pro forma* in order to bring the [* 515] case *before the circuit court, to which the respondent accordingly appealed. And upon the argument in the last-mentioned court, the first demurrer was sustained, and the decree of the district court in that respect affirmed; but so much of the decree as sustained the demurrer to the answer of the respondent, averring sufficient probable cause for the seizure of the cargo, was reversed, and a final decree upon that ground rendered against the libellants.

From this decree both parties have appealed to this court.

In relation to the proceedings in the court at Monterey, which is the subject of the first demurrer, the decision of the circuit court is correct.

All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the constitution of the United States the judicial power of the general government is vested in one supreme court, and in such inferior courts as congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the constitution or the laws of the United States. And neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations.

The courts established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the

agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the court at Monterey is a nullity, and can have no effect upon the rights of any party.

The second demurrer denies the authority of the district court to adjudicate, because the property had not been brought within its jurisdiction. But that proposition cannot be maintained; and a prize court, when a proper case is made for its interposition, will proceed to adjudicate and condemn the captured property or award restitution, although it is not actually in the control of the court. It may always proceed *in rem* whenever the prize or proceeds of the prize can be traced to the hands of any person whatever.

* As a general rule, it is the duty of the captor to bring it [* 516] within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned. This is required by the act of congress in cases of capture by ships of war of the United States; and this act merely enforces the performance of a duty imposed upon the captor by the law of nations, which in all civilized countries secures to the captured a trial in a court of competent jurisdiction before he can finally be deprived of his property.

But there are cases where, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before condemnation. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel; or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country; and may afterwards proceed to adjudication in a court of the United States. 4 Cr. 293; 7 *ibid.* 423; 2 Gall. 368; 2 Wheat. App. 11, 16; 1 Kent's Com. 359; 6 Rob. 138, 194, 229, 257.

But if no sufficient cause is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the court may refuse to adjudicate upon the validity of the capture, and award restitution and damages against the captor, although the seizure as prize was originally lawful, or made upon probable cause.

And the same rule prevails where the sale was justifiable, and the

captor has delayed, for an unreasonable time, to institute proceedings to condemn it. Upon a libel filed by the captured, as for a marine trespass, the court will refuse to award a monition to proceed to adjudication on the question of prize or no prize, but will treat the captor as a wrongdoer from the beginning.

But, in the case before us, sufficient cause for capture and condemnation is stated in the answer; and the reason assigned therein is a full justification for not sending *The Admittance* and her cargo to the United States. And as to the delay, he had reasonable ground for believing that no further proceedings were necessary after the condemnation at Monterey. The court had been constituted with the sanction of the executive department of the government, under whose orders he was acting; and it had condemned the vessel and cargo as prize, and ordered them to be sold. And if, as seems to be conceded in the argument, the proceeds were paid over to the government to await its further orders, and still remain in its hands, certainly no laches or neglect of duty in any respect can be imputed to the respondent.

[* 517] * Inasmuch, therefore, as the answer alleges a sufficient cause for selling the property before condemnation, and also for not proceeding against it in a court of competent jurisdiction, the respondent has forfeited none of the rights which he acquired by the capture. And, as the district court had jurisdiction, the second demurrer ought to have been overruled, and an order passed directing Captain Montgomery to institute proceedings by a certain day to condemn the property, (giving him reasonable time,) and that, upon his failure to comply with the order, the court should proceed on the libel filed against him for a marine trespass, and award such damages as the libellants might show themselves entitled to demand.

The necessity of proceeding to condemnation as prize, does not arise from any distinction between the instance court of admiralty and the prize court. In England, they are different courts; and, although the jurisdiction of each of them is always exercised by the same person, yet he holds the offices by different commissions. But, under the constitution of the United States, the instance court of admiralty and the prize court of admiralty are the same court, acting under one commission. Still, however, the property cannot be condemned as prize, upon this libel; nor would its dismissal be equivalent to a condemnation, nor recognized as such in foreign courts. The libellants allege that the goods were neutral, and not liable to capture; and their right to them cannot be divested until there is a sentence of condemnation against them as the prize of war. And, as that sentence cannot be pronounced in the present form of the proceeding, it

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becomes necessary to proceed in the prize jurisdiction of the court, where the property may be condemned or acquitted by the sentence of the court, and the whole controversy be finally settled. 4 Cr. 241, *Rose v. Himeley*; 2 Wheat. App. 41, 42; 1 Kent's Com. 101, 102; 6 Rob. 48; 3 *ibid.* 192; 2 Gall. 368; 2 *ibid.* 240.

But the circuit court erred in giving final judgment against the libellants, upon the ground that the answer showed probable grounds for the seizure. The question of probable cause is not presented in the present stage of the proceedings, and cannot arise until the validity of the capture is determined. If it turn out, upon the final hearing upon the question of prize or no prize, that the vessel and cargo were liable to capture and condemnation, it would necessarily follow that there was not only probable cause, but good and sufficient cause, for the seizure. And if, on the contrary, it should be found that they were not liable to capture, as prize of war, the libellants would be entitled to restitution, or the value in damages, although the strongest probabilities appeared against them at the time of the seizure. Probable cause or not becomes material only where restitution is awarded, and * the libellants claim additional damages, for [* 518] the injury and expenses sustained from the seizure and detention. It applies only to these additional damages; and, however strong the grounds of suspicion may have been, it is no bar to restitution, if the claimant can show that the goods which he claims belonged to him, were neutral, and that nothing had been done that subjected them to capture and condemnation.

The judgment of the circuit court must therefore be reversed, and a mandate awarded, directing the case to be remanded to the district court, to be there proceeded in, according to the rules and principles stated in this opinion.

The appeal on the part of the respondent is dismissed. The decision upon the matter in controversy was in his favor, and the question of law decided against him on the first demurrer, was open for argument upon the appeal of the libellants. There was no ground, therefore, for this appeal.

18 H. 110; 20 H. 296; 5 Wal. 62, 877.

THE STATE OF PENNSYLVANIA, Complainant, v. THE WHEELING AND BELMONT BRIDGE COMPANY, WILLIAM OTTERSON and GEORGE CROFT.

13 H. 518.

The Ohio River being a public navigable stream, of right, should remain free and unobstructed.

The Wheeling bridge is an obstruction of the free navigation of the Ohio by vessels propelled by steam.

A law of the State of Virginia authorizing this obstruction was inoperative.

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1. Because it impaired the obligation of the compact between Virginia and Kentucky, that the use and navigation of the Ohio, so far as the territory of Virginia or Kentucky is concerned, shall be free and common to the citizens of the United States.
2. Because it is in conflict with the legislation of congress which regulates the commerce among different States and with foreign nations carried on upon this river.

The State of Pennsylvania, as the proprietor of public works, suffers special damage in its property, by reason of this public nuisance, and this damage is continued from day to day, is not capable of proof and computation in each item thereof, and so is not reparable by the course of the common law, and in such a case a bill in equity, by the State, lies, to enjoin the nuisance.

But, if by the construction and use of a suitable and practicable draw, the navigation of the river should be restored to such a condition as, in the judgment of the court, renders it free from unreasonable obstruction, the bridge should not be treated as a nuisance.

THE substance of the pleadings and of the report of the commissioner, and the facts upon which the court proceeded, are set forth in its opinion.

Campbell, (attorney-general of Pennsylvania,) and *Stanton*, for the complainant.

Stewart and Johnson, contra.

[* 557] * M'LEAN, J., delivered the opinion of the court.

This bill was filed in the clerk's office of this court, in July, 1849. It charged that the defendants, under color of an act of the legislature of Virginia, but in direct violation of its terms, were engaged in the construction of a bridge across the Ohio River, at Wheeling, which would obstruct its navigation, to and from the ports of Pennsylvania, by steamboats and other craft which navigate the same. That the State of Pennsylvania owns certain valuable public works, canals, and railways, constructed at great expense as channels of commerce, for the transportation of passengers and goods, from which a large revenue, as tolls, was received by the State. That these works terminate on the Ohio River, and were constructed with direct reference to its free navigation; the goods and passengers transported on these lines were conveyed in steamboats, on the Ohio River; and the Wheeling bridge would so obstruct the navigation of that river, as to cut off and direct trade and business from the public works of Pennsylvania, impair and diminish the tolls and revenue of the State, and render its improvements useless. The bill prayed an injunction against the erection of the bridge, as a public nuisance, and for general relief.

In August, 1849, a supplemental bill was filed, stating that, after notice, the defendants continued to prosecute their work, and were engaged in stretching iron cables across the channel of the river,

which would obstruct its navigation, and it prayed that these cables might be abated.

At the December term of this court, 1849, another supplemental bill was filed, representing that defendants had completed the erection of the bridge, and that it had obstructed the passage of steamboats carrying freight and passengers to and from the ports of Pennsylvania; that it also hindered the passage of steamships and sea-going vessels, which were accustomed to be constructed at the ports of Pennsylvania, and would injure and destroy the trade and business of ship and boat building, which was carried on by the citizens of Pittsburg, and it prayed an abatement of the bridge as a public nuisance, and for general relief.

In their answers the defendants allege the exclusive sovereignty * of Virginia over the Ohio River, and set forth the [* 558] act authorizing the erection of the bridge. And they object to the application for an injunction and the relief prayed for, that the persons injured might have remedy in the courts of Virginia; that the State of Pennsylvania had no corporate capacity to institute this suit in the supreme court, to vindicate the rights of her citizens; that the State is only a nominal party, whose name was, without proper authority, used by individuals; that the bridge is a connecting link of a great public highway, as important as the navigation of the Ohio River; that Pennsylvania had set the example of authorizing bridges across the Ohio; that certain engineers of the United States had recommended a wire suspension bridge at Wheeling, and gave as their opinion, that "by an elevation of ninety feet, every imaginable danger of obstructing the navigation would be avoided;" that certain reports of committees in congress recognized the necessity of a bridge at Wheeling, and recommended an appropriation for that purpose; that the headway for steamers left by the bridge is amply sufficient, forty-seven feet above the water, for all useful purposes; and if sufficient draught cannot be had at that height, blowers might be added; that chimneys might have hinges on them, so as to be lowered without much inconvenience; that the bridge will not be an appreciable inconvenience to the average class of boats; that the bridge will not diminish or destroy trade between Pittsburg and other ports, or do irreparable injury to the citizens of Pennsylvania.

The answer admits that the State of Pennsylvania has expended large sums of money in the construction of public improvements, terminating at Pittsburg and Beaver; that a great amount of freight and a large number of passengers do pass over said works, and that a large amount of toll to the State is derived therefrom; that the

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navigation of the Ohio River is important to the works above referred to, and that the value thereof would be affected injuriously if from any cause the passage of steamboats from the city of Pittsburg downwards were obstructed or impeded. But they deny that their bridge or the cables will have any such effect, or that it can in truth be called a nuisance.

To the actual obstruction occasioned by the bridge, as charged in the second supplemental bill, they set up an amendatory and explanatory act of the Virginia legislature, passed January 11, 1850, declaring the height of ninety feet at the eastern abutment, ninety-three and a half feet at the highest point, and sixty-two feet at the western abutment, above the low-water level of the Ohio River, to be of lawful height, and in conformity with the intent and meaning of the 19th section of the charter.

[* 559] *At December term, 1849, the question of jurisdiction was argued on both sides, and it was sustained by the entry of an order of reference to the Hon. R. H. Walworth, as special commissioner to take testimony and report:—

1. Whether the bridge is, or is not, an obstruction of the free navigation of the Ohio River, by vessels propelled by steam or sails, engaged, or which may be engaged, in the commerce or navigation of said river.

2. If an obstruction be made to appear, what change or alteration in the construction and existing condition of the said bridge, if any, can be made, consistent with the continuance of the same across said river, that will remove the obstruction to the free navigation.

At the ensuing term, near its close, the commissioner made his report, together with the report of the engineer employed, and the evidence taken before him, deciding:—

1. That the bridge is not an obstruction to the free navigation of the Ohio by any vessels propelled by sails.

2. That the bridge is an obstruction of the free navigation of the Ohio by vessels propelled by steam.

3. That the change or alteration which can and should be made in the construction and existing condition of the bridge is, to raise the cables and flooring in such manner as to give a level headway, at least three hundred feet wide, over a convenient part of the channel, of not less than one hundred and twenty feet above the level of zero on the Wheeling water-gauge.

To this report several exceptions were taken, by the counsel on both sides.

As this is the exercise of original jurisdiction by this court, on the ground that the State of Pennsylvania is a party, it is important to

ascertain whether such a case is made out as to entitle the State to assume this attitude. In the 2d section of the third article of the constitution, it is declared that the supreme court shall have original jurisdiction in a case, where a State shall be a party.

In this case, the State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. The sovereign powers of a State are adequate to the protection of its own citizens, and no other jurisdiction can be exercised over them, or in their behalf, except in a few specified cases. Nor can the State prosecute this suit on the ground of any remote or contingent interest in itself. It assumes and claims, not an abstract right, but a direct interest in the controversy, and that the power of this court, can redress its wrongs and save it from irreparable injury. If such a case be made out, the jurisdiction may be sustained.

* When a State enters into a copartnership, or becomes a [* 560] stockholder in a bank, or other corporation, its sovereignty is not involved in the business, but it stands and is treated as other stockholders, or partners. And so in the present case, the rights asserted and relief prayed, are considered as in no respect different from those of an individual. From the dignity of the State, the constitution gives to it the right to bring an original suit in this court. And this is the only privilege, if the right be established, which the State of Pennsylvania can claim in the present case.

It is objected, in the first place, that there is no evidence that the State of Pennsylvania has consented to the prosecution of this suit in its own name.

This would seem to be answered by the fact, that the proceedings were instituted by the attorney-general of the State. He is its legal representative, and the court cannot presume, without proof, against his authority. In January, 1850, the following declaration passed unanimously by both branches of the Pennsylvania legislature : " Whereas the navigation of the River Ohio has been, and is now obstructed by bridges erected across its channel, between Zane's Island and the main Virginia and Ohio shores, so that steamboats and other water crafts hitherto accustomed to navigate said river, are hindered in their passage to and from the port of Pittsburg, and other ports in the State of Pennsylvania, and the trade and commerce, and business of this commonwealth interrupted, the revenue of her public works diminished and impaired, and steamboats, owned and navigated by citizens of this State, bound to and from her ports, are subjected to labor, expense, and delay, with hazard to life and property, by reason whereof the said bridges are a common and pub-

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lic nuisance, injurious to the State of Pennsylvania and her citizens, therefore, be it resolved, &c. : —

“2. That the proceedings, in behalf of said State, instituted by her attorney-general in the supreme court of the United States, and now pending therein against the Wheeling and Belmont Bridge Company, to abate the nuisance occasioned by their bridge lately erected across the Ohio, be prosecuted to final judgment, decree, and execution, for abatement of said nuisance.”

On a question of disputed boundary between two States, although the inquiry of the court is limited to the establishment of a common line, yet the exercise of sovereign authority, over more or less territory, may depend upon the decision. This gives great dignity and importance to such a controversy, and renders necessary a broader view, than on a question as to the mere right of property. But [* 561] in the present case, the State of * Pennsylvania claims nothing connected with the exercise of its sovereignty. It asks from the court a protection of its property, on the same ground and to the same extent as a corporation or individual may ask it. And it becomes an important question whether such facts are shown, as to require the extraordinary interposition of this court.

Relief in this form is given, as it cannot be given adequately in any other. The injury complained of, in the language of the books, must be irreparable by a suit at law for damages. It is matter of history, as well as in proof, that Pennsylvania, for many years past, has been engaged in making extensive improvements by canals, railroads, and turnpikes, many of them extending from Eastern Pennsylvania to Pittsburg, by which the transportation of goods and passengers is greatly facilitated, and that a large portion of the goods and passengers, thus transported, are conveyed to and from Pittsburg on the Ohio River.

On the 18th of December, 1789, an act was passed by Virginia, consenting to the erection of the State of Kentucky out of its territory, on certain conditions, among which are the following: “That the use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States.” Virg. Revised Code, 1819, p. 19. To this act the assent of congress was given. 1 Stats. at Large, 189.

That the Ohio River is navigable, is a historical fact, which all courts may recognize. For many years the commerce upon it has been regulated by congress, under the commercial power, by establishing ports, requiring vessels which navigate it to take out licenses,

and to observe certain rules for the safety of their passengers and cargoes. Appropriations by congress have been frequently made, to remove obstructions to navigation from its channel.

It appears that Pennsylvania has constructed a combined line of canal and railroad from Pittsburg and Alleghany cities, to the city of Philadelphia, a distance of about four hundred miles, at an expense of about sixteen millions of dollars, all of which are owned by the State. There is also a railroad from Pittsburg to Harrisburg, which will soon be completed, at an expense of some eight or ten millions of dollars. There is also a slack-water navigation from Pittsburg to Brownsville, and up the Yaughegany to West Newton, and there are other lines of communication between Pittsburg and the east, which are owned in whole or in part by the State, and from which it derives revenue.

And the witnesses generally say, that any obstruction on the Ohio River, to the free passage of steamboats, must affect injuriously *the revenue from the above public works, as it would [* 562] divert the transportation of goods and passengers from the lines to and from Pittsburg, to the northern lines through New York. Whilst the witnesses differ as to the amount of such an injury, they generally agree in saying, that any serious obstruction on the Ohio would diminish the trade and lessen the revenue of the State. The value of the goods to and from Pittsburg, transported on the above lines of communication, is estimated at from forty to fifty millions annually. And it is shown that the commerce on the Ohio, to and from Pittsburg, amounts to about the same sum.

If the bridge be such an obstruction to the navigation of the Ohio as to change, to any considerable extent, the line of transportation through Pennsylvania to the northern route through New York, or to a more southern route, an injury is done to the State of Pennsylvania as the principal proprietor of the lines of communication, by canal and railroad, from Philadelphia to Pittsburg. And this injury is of a character for which an action at law could afford no adequate redress. It is of daily occurrence, and would require numerous, if not daily prosecutions, for the wrong done; and from the nature of that wrong, the compensation could not be measured or ascertained with any degree of precision. The effect would be, if not to reduce the tolls on these lines of transportation, to prevent their increase with the increasing business of the country.

If the obstruction complained of be an injury, it would be difficult to state a stronger case for the extraordinary interposition of a court of chancery. In no case could a remedy be more hopeless by an action at common law. The structure complained of is permanent,

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and so are the public works sought to be protected. The injury, if there be one, is as permanent as the work from which it proceeds, and as are the works affected by it. And whatever injury there may now be, will become greater in proportion to the increase of population and the commercial developments of the country. And in a country like this, where there would seem to be no limit to its progress, the injury complained of would be far greater in its effects than under less prosperous circumstances.

As we are now considering the obstruction of the bridge, not as to the relief prayed for, but as to the form of the remedy adopted by the complainant, we are brought to the conclusion, as before announced by this court to the parties, that there is made out a *prima facie* case for the exercise of jurisdiction. The witnesses who testify to the obstruction are numerous, and the weight of their testimony is not impaired by the impeachment of their credit, or a denial of the facts stated by them.

[* 563] * But it is objected, if not as a matter going to the jurisdiction as fatal to any further action in the case, that there are no statutory provisions to guide the court, either by the State of Virginia, or by congress. It is said that there is no common law of the Union on which the procedure can be founded; that the common law of Virginia is subject to its legislative action, and that the bridge, having been constructed under its authority, it can in no sense be considered a nuisance. That whatever shall be done within the limits of a State, is subject to its laws, written or unwritten, unless it be a violation of the constitution, or of some act of congress.

It is admitted that the federal courts have no jurisdiction of common law offences, and that there is no abstract pervading principle of the common law of the Union under which we can take jurisdiction. And it is admitted, that the case under consideration, is subject to the same rules of action as if the suit had been commenced in the circuit court for the district of Virginia.

In the second section of the third article of the constitution it is declared: "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

Chancery jurisdiction is conferred on the courts of the United States with the limitation "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law." The rules of the high court of chancery of England have been adopted by the courts of the United States. And there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value

of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States, and which has been decided against in a state court.

In exercising this jurisdiction, the courts of the Union are not limited by the chancery system adopted by any State, and they exercise their functions in a State where no court of chancery has been established. The usages of the high court of chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government, it has been observed.

In *Robinson v. Campbell*, 3 Wheat. 222, it is said: "The court, therefore, think that, to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be, at common law or in equity, not according to the practice * of [* 564] state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles."

This principle is not controverted by what is laid down in the case of *Wheaton and Donaldson v. Peters*, 8 Pet. 658. In that case, the court say: "It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common law right is asserted, we must look to the State in which the controversy originated." The inquiry, in that case, was, whether a copy-right existed by common law in the State of Pennsylvania. But in the case above cited from 3 Wheaton, the court spoke of the remedy. By the act of congress of 1828,¹ proceedings at law in the courts of the United States are required to conform to the modes of proceeding in the state courts; but there is no such provision in regard to courts of chancery.

Under this system, where relief can be given by the English chancery, similar relief may be given by the courts of the Union.

An indictment at common law could not be sustained in the federal courts by the United States, against the bridge as a nuisance, as no such procedure has been authorized by congress. But a proceeding on the ground of a private and an irreparable injury, may be sustained against it by an individual or a corporation. Such a pro-

¹ 4 Stats. at Large, 278.

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ceeding is common to the federal courts, and also to the courts of the State. The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case where the jurisdiction is made out, the same as in a public prosecution. If the obstruction be unlawful, and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.

Such a proceeding is as common and as free from difficulty as an ordinary injunction bill, against a proceeding at law, or to stay waste or trespass. The powers of a court of chancery are as well adapted, and as effectual for relief in the case of a private nuisance, as in either of the cases named. And, in regard to the exercise of these powers, it is of no importance whether the eastern channel, over which the bridge is thrown, is wholly within the limits of [* 565] the State of Virginia. The Ohio being a * navigable stream, subject to the commercial power of congress, and over which that power has been exerted; if the river be within the State of Virginia, the commerce upon it, which extends to other States, is not within its jurisdiction; consequently, if the act of Virginia authorized the structure of the bridge, so as to obstruct navigation, it could afford no justification to the bridge company.

The act of Virginia, under which the bridge was built, with scrupulous care, guarded the rights of navigation. In the 19th section, it is declared: "That, if the said bridge shall be so constructed as to injure the navigation of the said river, the said bridge shall be treated as a public nuisance, and shall be liable to abatement, upon the same principles and in the same manner that other public nuisances are." And, in the act of the 19th of March, 1847, to revive the first act it is declared, in the 14th section: "That if the bridge shall be so erected as to obstruct the navigation of the Ohio River, in the usual manner, by such steamboats and other crafts as are now commonly accustomed to navigate the same, when the river shall be as high as the highest floods hereinbefore known, then, unless, upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last-mentioned bridge may be treated as a public nuisance, and abated accordingly."

This is a full recognition of the public right on this great highway, and the grant to the Bridge Company was made subject to that right.

It is objected that there is no act of congress prohibiting obstructions on the Ohio River, and that until there shall be such a regulation, a State, in the construction of bridges, has a right to exercise its own discretion on the subject.

Congress have not declared in terms that a State, by the construc-

tion of bridges, or otherwise, shall not obstruct the navigation of the Ohio, but they have regulated navigation upon it, as before remarked, by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for neglect of those duties, by which damage to life or property has resulted. And they have expressly sanctioned the compact made by Virginia with Kentucky, at the time of its admission into the Union, "that the use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States." Now, an obstructed navigation cannot be said to be free. It was, no doubt, in view of this compact, that in the charter for the bridge, it was required to be so elevated, as not, at the greatest height of the * water, [* 566] to obstruct navigation. Any individual may abate a public nuisance. 5 Bac. Ab. 797; 2 Roll. Ab. 144, 145; 9 Co. 54; Hawk. P. C. 75, § 12.

This compact, by the sanction of congress, has become a law of the Union. What further legislation can be desired for judicial action? In the case of *Green et al. v. Biddle*, 8 Wheat. 1, this court held that a law of the State of Kentucky, which was in violation of this compact between Virginia and Kentucky, was void; and they say this court has authority to declare a state law unconstitutional, upon the ground of its impairing the obligation of a compact between different States of the Union.

The case of *Wilson v. The Blackbird Creek Marsh Company*, 2 Pet. 250, is different in principle from the case before us. A dam was built over a creek to drain a marsh, required by the unhealthiness it produced. It was a small creek, made navigable by the flowing of the tide. The chief justice said it was a matter of doubt, whether the small creeks, which the tide makes navigable a short distance, are within the general commercial regulation, and that, in such cases of doubt, it would be better for the court to follow the lead of congress. Congress have led in regulating commerce on the Ohio, which brings the case within the rule above laid down. The facts of the two cases, therefore, instead of being alike, are altogether different.

No state law can hinder or obstruct the free use of a license granted under an act of congress. Nor can any State violate the compact, sanctioned as it has been, by obstructing the navigation of the river. More than this is not necessary to give a civil remedy for an injury done by an obstruction. Congress might punish such an act criminally, but until they shall so provide, an indictment will not

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lie in the courts of the United States for an obstruction which is a public nuisance. But a public nuisance is also a private nuisance, where a special and an irremediable mischief is done to an individual.

In the case of *The City of Georgetown v. The Alexandria Co.* 12 Pet. 98, this court say: "The court of equity, also, pursuing the analogy of the law, that a party may maintain a private action for special damages, even in case of a public nuisance, will now take jurisdiction in case of a public nuisance, at the instance of a private person, where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy." Where no special damage is alleged, an individual could not prosecute in his own name for a public nuisance. This doctrine is laid down in *Conning et al. v.* [* 567] *Lowerre*, 6 Johns. * Ch. 439. In that case, the injunction was granted, and the chancellor said, "that here was a special grievance to the plaintiffs, affecting the enjoyment of their property and the value of it. The obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs."

Chancellor Kent, in the 3d volume of his Commentaries, 411, says: "The common law, while it acknowledged and protected the right of the owners of the adjacent lands to the soil and water of the river, rendered that right subordinate to the public convenience, and all erections and impediments made by the owners, to the obstruction of the free use of the river as a highway for boats and rafts, are deemed nuisances."

In *Sampson v. Smith*, 8 Simons, 272, it was held that injury to the plaintiff's trade was sufficient to give jurisdiction against a public nuisance, and that it was not necessary to use, in such a prosecution, the name of the attorney-general. And this was on a bill for the discontinuance of works already erected.

It is said, "the question of nuisance, or not, must, in cases of doubt, be tried by a jury." 2 Story's Eq. § 923. In this respect, the question is similar to an application for the protection of a patent. Where the right has been long enjoyed, or is clear of doubt, chancery will interfere without a trial at law. Mr. Justice Story says, *Ibid.* § 924: "A court of equity will not only interfere upon the information of the attorney-general, but also upon the application of private parties, directly affected by the nuisance; whereas, at law, in many cases the remedy is, or may be, solely through the instrumentality of the attorney-general."

In the same volume, § 925, it is said: "In regard to private nuisances the interference of courts of equity, by way of injunction, is

undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits." Mit. Eq. Pl. by Jeremy, 144, 145; Eden on Injunctions, c. 11, 231, 238.

"There must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot otherwise be prevented than by an injunction." "Formerly, indeed, courts of equity were extremely reluctant to interfere at all, even in regard to repeated trespasses. But now there is not the slightest hesitation, if the acts done, or threatened to be done to the property, would be ruinous or irreparable." 2 Story's Eq. § 928.

In *Ripon v. Hobart*, 3 Mylne & Keen, 169, Lord Brougham says "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting *for the result of a trial; and will, according to the circumstances, direct an issue or allow an action," &c. Lord Eldon, in the case of *Attorney-General v. Cleaver*, 18 Ves. 218, appeared to think that there was no instance of an injunction to restrain a nuisance without trial. But in this he was clearly wrong.

The fact that the bridge constitutes a nuisance is ascertained by measurement. The height of the bridge, of the water, and of the chimneys of steamboats, are the principal facts to be ascertained. If the obstruction exists, it is a nuisance. To ascertain this a jury is not necessary. It is shown in the report, by a mathematical demonstration. And the other matters, connected with the case, as to the benefit of high chimneys, lowering of them in passing under the bridge, and shortening chimneys, are matters of science and experience, better ascertained by a report than by a verdict. And the same may be said of the statistics which are in the case.

The object of the suit was, not the recovery of damages, but to enjoin the defendants from building the bridge which would injure the plaintiff. If the bridge be a material obstruction to the navigation of the Ohio, it is not denied that the plaintiff would be injured. The ground of defence taken and maintained is, that the bridge is not a material obstruction to commerce on the river. On this point there is no doubt. A jury, in such a case, could give no aid to the court, nor security to the parties. Having had notice of an application for an injunction, before the defendants had thrown any obstruction over the river, they cannot claim that their position is strengthened by the completion of the bridge.

But it is said, the bridge constitutes no serious obstruction to the

navigation of the Ohio; that only seven steamboats, of two hundred and thirty which ply upon the river as high as Pittsburg, are obstructed; and that arises from the height of their chimneys, which might be lowered at a small expense, in passing under the bridge; that by the introduction of blowers, the chimneys might be shortened without lessening the speed of the boats; that the goods and passengers which are conveyed on the public lines of communication, between Pittsburg and Philadelphia, could be as well conveyed on boats of lower chimneys, and consequently the State, as proprietor of those lines, if at all injured, is injured so inconsiderably as not to lay the foundation of this procedure; that none of the packets or the other boats on the river are owned by the State of Pennsylvania.

That the bridge constitutes an obstruction, is shown by the report of the commissioner, the answer of defendants, the proof in the case, and by the admission in the argument of the counsel for the defendants. The report of the commissioner is considered, [* 569] *as to the fact of the obstruction and the extent of it, of the same force as a verdict of a jury. The report having been the result of a most arduous and scientific investigation of the facts, is entitled to the full weight of a verdict. 2 Railway Cases, 330. The fact of obstruction was a plain and practical question, but it was connected with other matters involving questions of science, which were to be settled on the opinion of experts, and a report being fairly made, the court will generally assume it as a basis of action, unless it shall be shown to have been made under improper influences, or through a mistake of facts. 1 Railway Cases, 576; Shelford on Railways, 430.

In his report, the commissioner says: "The boats running in that line, and passing the site of the present suspension bridge, in 1849, previous to the time when the first cables were thrown across the eastern branch of the Ohio, at Wheeling, were The Clipper, No. 2; The Hibernia, No. 2; The Brilliant; The Messenger, No. 2; The Isaac Newton; The New England, No. 2; and The Monongahela.

"The Clipper, No. 2, came out in March, 1846, was 215 feet long, and had chimneys 64 feet high. The Hibernia, No. 2, came out in 1847. She was 225 feet long, and her chimneys were 72½ feet high from the water. The Brilliant came out in February, 1848, was 227 feet long, and had chimneys 71 feet high. The Messenger, No. 2, came out in the winter or spring of 1849, was 242 feet long, and has chimneys 76½ feet high. The Isaac Newton was 182 feet long, and had chimneys only 63½ feet high. The New England, No. 2, was 222 feet long, and her chimneys were 65½ feet high. "The dimensions and height of the chimneys of The Monongahela," the com-

missioner says, "I have not been able to ascertain from the evidence."

"There were also two other regular packets running past Wheeling in the spring and summer of 1849, previous to the erection of the bridge; the two Telegraphs, running as regular packets between Pittsburg and Louisville. The chimneys of The Telegraph, No. 1, were 80 feet high, and those of the other Telegraph were 79 feet 9 inches high.

"Not more than two or three of these nine packets had their chimneys prepared for lowering at the close of the navigation in the summer of 1849. And of the five largest, only one of them could have gotten under the bridge on a twenty feet stage of water, with the chimneys standing; and that one, The Brilliant, could not have gotten under when the water was more than twenty-one feet upon the Wheeling Bar. And neither of the two Telegraphs could have gotten under the bridge at a thirteen feet stage of the water, with their chimneys standing."

"If the bridge," says the commissioner, "had been erected [* 570] in 1847, therefore, and those nine packets had then been running, two of them could not have gotten under the bridge for nearly three months, when the water was thirteen feet and over; two of them would have been unable to get under for thirty-three days, when the water on the bar was twenty feet and over; another, The Brilliant, from nineteen to twenty-five days, when the water was twenty-nine feet and over; and the other four as much as ten days, when the water was twenty-nine feet and over,—unless they had lowered or cut off their chimneys."

"The passage of three of the Pittsburg and Cincinnati packets, which were running on the Ohio before the erection of the bridge, had been actually stopped or obstructed by such bridge previous to the order of reference in this cause: The Messenger, No. 2, The Hibernia, No. 2, and The Brilliant.

"The first of these boats arrived at the bridge on the 10th of November, 1849, on her downward passage, upon a twenty feet stage of water, and had to cut off her chimneys before she could pass the bridge. She was detained there about seven hours, but I believe she did not lose her trip or passengers. She was subsequently detained at the bridge seven hours, and was obliged to cut off her chimneys a second time.

"On the 11th of November, 1849, The Hibernia, No. 2, reached the bridge on her upward trip. They attempted to get her under the bridge by sinking her deeper in the water with coal ballast. But, in attempting to pass the bridge, the top of one of her chimneys caught

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upon a projection from the under side of one of the flooring timbers, and injured the chimney so that it had to be taken down and repaired. The boat was detained thirty-two hours at Wheeling on that occasion; and was obliged to hire another boat to take her passengers on to Pittsburg, except such of them as preferred to cross the mountains by the way of Cumberland.

"On the 18th of the same month, the passage of *The Hibernia*, No. 2, was again obstructed by the bridge on her downward passage, by which she lost an entire trip. Finding she could not get under the bridge in time to save her trip, she transferred her freight and passengers to another boat, and returned to Pittsburg. And the passage of the same boat was again obstructed by the bridge in coming up the river last spring. On that occasion, she arrived at Wheeling between nine and ten o'clock in the morning, and finding she could not get under the bridge, she gave up the trip, and landed her passengers, who proceeded east by way of Cumberland.

"The *Brilliant* was obstructed by the bridge on her passage [* 571] up on the 18th December, 1849, and had to wait until her chimneys could be cut off, to enable her to pass under the bridge. The chimneys were cut off at great risk to the lives of those who were engaged in the operation; and the boat passed under the bridge and proceeded to Pittsburg after a detention of four or five hours.

"In the winter and spring subsequent to the erection of the bridge, *The Buckeye State*, *The Keystone State*, and *The Cincinnati*, three new packets, were brought into the Pittsburg and Cincinnati lines, in the places of *The New England*, No. 2, *The Isaac Newton*, and *The Monongahela*. They were all of much larger dimensions and had much taller chimneys than the old boats for which they were substituted, and their chimneys were hinged and rigged for lowering." The chimneys of *The Buckeye State* were 74 feet 8 inches high, those of *The Keystone* 77 feet 5 inches, and those of *The Cincinnati* 84 feet 7 inches.

"Two accidents have occurred to those new boats in passing under the bridge since they came out. *The Keystone State*, on her downward passage, the 4th of March last, in attempting to pass under the apex of the bridge upon a thirteen and a quarter feet stage of water, could not get near enough to the Wheeling shore to pass under the apex of the bridge. And in attempting to drop down about twenty feet further west, one of the chimneys struck the bridge and tore away all the guys or fastenings of both chimneys, except one guy-rod, broke the westerly chimney in two, broke off the hinge from the other chimney, and tore up some portions of the hurricane deck to

which the guy-rods were fastened. And if the remaining guy-rod had given way, both chimneys, weighing together about four tons, would have fallen down."

A somewhat similar accident, it seems from the report, occurred to The Cincinnati, in October, 1850.

On the practicability and safety of lowering the chimneys, a great number of witnesses were examined. And the commissioner says, although there was great conflict in the testimony as respects the danger to the limbs and lives of the passengers in the operation, yet, he says, when the facts sworn to are examined, there is a decided preponderance against the safety of lowering the chimneys. And he remarks: "The very elevated as well as large chimneys used upon the Cincinnati and Pittsburg packets, and other boats of that class, cannot certainly with any facility or safety be lowered by hinges at the tops. They are therefore obliged to lower them at the hurricane-deck, by means of a derrick. The weight of the parts of the two chimneys, which must be let down upon those large boats, is estimated by the witnesses to be from three to four tons. This enormous weight hanging over the cabin, or rather over [* 572] the berths of passengers, in process of lowering, would probably prove disastrous in the extreme if, by any accident, the chimneys should come down by the run; which is very likely to occur, from the carelessness or stupidity of the green hands that the owners and officers of western boats are so often obliged to employ."

And if to the difficulties stated in the report, there be added the darkness of the night, a snow storm, or the falling rain congealing on the roof of the boat and covering it with ice, and a high wind, which generally is experienced in a storm, it would be impracticable, while the boat was proceeding at the rate of ten or twelve miles an hour, to lower the chimneys; and this must be done, or the boat must land. During this operation, the pilot, on whom the safety of the boat and the lives of the passengers in a great degree depend, must, from his position, be in imminent danger.

The expense of lowering the chimneys, if practicable and safe, would constitute no inconsiderable item. The time lost in raising and lowering chimneys is variously estimated by the witnesses at from one to three hours. Take the minimum of such estimate, and, according to the calculation of Colonel Long, the expense of the boat amounts to \$8.33 per hour. Each packet will have to lower its chimneys every time it passes under the bridge, which will be, ordinarily, sixty times a season, amounting to the sum of \$499.80, a charge on each packet. To this may be added the apparatus for lowering the chimneys, estimated at \$400, which, with its repairs,

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may be estimated at \$100 per annum during the life of the boat, which averages five years. And it is in proof that stationary chimneys will last five years, but if subject to be lowered, they will only last half that time. The cost of chimneys for a boat is stated at \$1,000, which may be considered as an increased expense to each boat of \$200 per annum. These sums, added together, make a total of \$799.80, which sum, multiplied by seven, the number of the packets, make the sum of \$5,598.60, which the owners of these packets must necessarily pay as an annual tax, by reason of the obstruction of the bridge, if they run their boats and lower their chimneys.

But it is contended that the difficulty of passing under the bridge may be obviated by shortening the height of the chimneys without lessening materially the speed of the boat.

That high chimneys increase the speed of the boat is proved in the case practically and scientifically.

Professors Renwick, Byrne, and Locke say that, by a law of nature, the force or velocity of a draft depends upon the height [* 573] * of the chimney; the force and velocity being measured by the difference in the weight between the column of air within the chimney and an outside column of equal height and diameter; so that a reduction of the height of the chimney involves a diminution of that force with which nature supplies air to combine with fuel for combustion, and, by consequence, their follows a diminution of heat developed in the furnace, of steam generated in the boiler, and of power by which the wheel is moved and the boat propelled.

The commissioner in his report says, "the deduction of science also shows that the draft is increased by elongating the chimneys." In this question, economy of fuel is not the object to be attained, but the greatest practicable speed consistent with safety. And this is attained, where there is no defect in the furnace, by the combustion of the largest amount of fuel. Forty-three bushels of bituminous coal are consumed per hour by each of the Pittsburg packets.

The commissioner says: "In relation to the question whether chimneys as high as those now in use upon the Pittsburg and Cincinnati packets, and some of the larger boats on the Ohio, are necessary for obtaining the maximum of speed desirable in the navigation of the river, there is a diversity of opinion among the witnesses, especially among those who are not acquainted with the scientific principles of chimney-draft in reference to the combustion of fuel for the generation of steam. But I think there is a great preponderance of the testimony, even of that class of witnesses, in favor of the necessity of very high chimneys upon the large Ohio steamboats."

And he further remarks : " Rejecting the deductions of science on the subject, the teachings of experience show, that as boats upon the Ohio have been gradually improved in their dimensions, from time to time, and the height of their chimneys increased, they have been enabled to run with greater speed, to the evident advantage of commerce and of travel upon the rivers. And the fact that several different projects for procuring artificial draft, such as blowers, as an available substitute for the draft of tall chimneys, have been tried upon the western waters, and have failed and been abandoned, is very strong evidence in favor of the necessity of natural draft for the combustion of wood and bituminous coal upon the steamboats navigating the Ohio."

There is no better evidence of utility than the progress made in the structure of steamboats and of the machinery by which they are propelled. Men who are engaged in navigation learn by experience, and adopt that which will be most conducive to their own interests.

* It appears from the statement of Scowden, an engineer, [* 574] that the chimneys of the first boat, called *The Cincinnati*, were eighty-four feet high from the surface of the water when light, and about seventy-four feet high from the centre of the flues. Her chimneys were shortened eight feet, and it diminished her speed up stream from a mile to a mile and a half per hour. Captain Hazlep states, that adding eight feet to the chimney of *The Telegraph*, in 1849, increased her speed about half a mile an hour up stream. And by Captain Duval, that *The Clipper's* chimney being cut off eight feet, in order to pass the Wheeling bridge, reduced her speed about three hours between *Cincinnati* and *Pittsburg*. And it may be fairly inferred that a reduction of twenty feet would reduce the speed between *Cincinnati* and *Pittsburg* about four hours.

According to this estimate, the cost of the boat per hour being, as above stated, \$8.33, if there should be an average loss of four hours in each trip, it would amount to \$33.32. This sum, multiplied by sixty, the average number of trips each season, would amount to the sum of \$1,999.20, and this being multiplied by seven, the number of the packets, would make the sum of \$13,994.40, an annual loss by the owners of the packets, by reducing the height of their chimneys, so as to pass under the bridge at the different stages of the water.

But it is said these seven packets are the only boats obstructed by the bridge, of the two hundred and thirty which ply upon the Ohio, and run to *Pittsburg*.

The transportation of goods and passengers by these packets will show their relative importance, as instruments of commerce, between

Cincinnati and Pittsburg. From the evidence, it appears that they convey about one half of the goods in value, and three fourths of the passengers, between those cities. Taking The Keystone State as a criterion, each packet transports annually thirty thousand nine hundred and sixty tons of freight, and twelve thousand passengers. The line was established in 1844, and it appears from the proof that since that time it has transported between the above cities nearly a million of passengers.

It is in proof that the life of these packets averages five years, when their places in the line must be supplied by new boats. If, to their original cost of construction, there be added the expense of running them for five years, adding nothing for repairs or accidents, a total sum will be expended of \$1,680,000. This amount of capital is appropriated every five years in running this line of packets. The structure of the bridge cost less than one eighth of that sum.

The speed of these boats, their excellent accommodations, and their general good management, recommend them to the public, as is shown by the large amount of goods and passengers they [* 575] * convey. And any change in their structure, or in the production of the propelling power, which shall impede their progress, would not only impose upon their proprietors a most onerous tax, but it would greatly lessen their profits, by reducing the amount of freight and passengers. And no part of the amount would, probably, pass to other boats on the river, but to the northern or southern lines, where greater expedition is given.

In the report of the commissioner, a statement is made of the stages of water at Wheeling for twelve years, beginning on the 10th of March, 1838, and ending on the 9th of the same month, 1850.

The highest part of the bridge, by actual measurement from the ground, is 91.31 feet. This elevation is only at a single point, two hundred and eighty-four feet from the face of the eastern abutment. From the apex it deflects east and west, being at the distance of forty feet westward only 89.48 feet above the ground, and at the same distance east only 89.77 feet above the ground. The chimneys on the seven packets require a space of about thirty feet in width to pass under the bridge within the eighty feet allowed, and the depth of water and a sufficient headway must be deducted, to show the height of the bridge for the passage of boats. The headway required, as appears from the report of the engineer, should be between the tops of the chimneys and the lowest parts of the bridge, from two to three feet. This would reduce the space, say two feet and a half to 87.27 feet.

In the twelve years above stated, the water was at the stage of

twenty-one feet and over, two hundred and nineteen days ; consequently no boat whose chimneys were 66½ feet high, could have passed under the bridge. Twenty-one feet of water are substituted for twenty feet in the table reported, that statement allowing a foot of water below the measurement. The water, in the above period, was twenty-six feet and over, eighty-three days, during which time no boat could have passed under the bridge whose chimneys were sixty-two feet high. The water was twenty-eight feet and over fifty-five days during the twelve years, which would have prevented a boat from passing under the bridge whose chimneys were sixty feet high. Within the same period, the water was sixteen feet and over, five hundred and thirty-four days ; consequently, boats whose chimneys were seventy-two feet high, during that whole time could not have passed under the bridge.

In his report, the commissioner says : " The bridge is nine hundred and eighty feet between the bases of the two abutments. At the highest point of the bridge, for the distance of about fifty-six feet in width, there is a clear headway, for the * passage of [* 576] steamboats with their chimneys standing of ninety-one feet above extreme low water. But this space of fifty-six feet in width is not over any part of the river at extreme low water. The water upon the Wheeling Bar must be about four feet deep, to bring the easterly edge of the stream under the western extremity of the fifty-six feet. And it must be more than fifteen feet deep upon the bar to enable a steamboat drawing five feet, to avail itself of the ninety-one feet headway above low-water mark, for the whole width of fifty-six feet."

It follows, from this statement of facts, that a steamboat drawing five feet of water, and whose chimneys are 79½ feet high or over, can never pass under the apex of the bridge at any stage of the water without lowering her chimneys."

From the data referred to, the defendants' counsel contend that in a few years at most, there will be a concentration of railroads at Wheeling, and at other places on the Ohio, connecting the Eastern with the Western country, which, from their speed and safety, must take from the river the passengers and a considerable portion of the freight now transported in steamboats. That these roads, crossing the Ohio River, will reach the commercial ports of the interior, and diffuse a larger amount of commerce than that which is now transported on the Ohio. And it is intimated that the Wheeling bridge may be used by the railroad cars ; but it is clearly proved that the bridge is not calculated for such a transportation.

However numerous these roads may be, there can be no doubt

that, like similar roads in other parts of the country, their cars will be loaded with freight and passengers. But it may not follow that the Ohio and our other rivers will be deserted, or their business reduced. We have an extent of river coast, counting both shores, exceeding twenty-five thousand miles, through countries the most fertile on the globe. This is a greater distance than the combined railways of the world. That our railroads, as avenues of commerce, may develop our resources in a greater degree than is now anticipated, must be the desire of every one. But the great thoroughfares provided by a beneficent Providence, should neither be neglected nor abandoned. They will still remain the great arteries of commerce.

Past experience teaches us that, however the facilities of commerce may be multiplied, her tracks will be filled with productions which enrich the country, and add to the comforts and enjoyments of its rapidly increasing population. The rewards of labor will give an irresistible impulse to enterprise, which must secure to our country a prosperity unequalled in history. Our internal commerce is more than three times as great as our foreign, and the increased [* 577] lines of intercourse will cause both * rapidly to advance.

The protection of the river commerce is by no means hostile to any other. The multiplication of commercial facilities will, in the same proportion, increase the articles of trade.

If viaducts must be thrown over the Ohio for the contemplated railroads, and bridges for the accommodation of the numerous and rising cities upon the banks of the river, it is of the highest importance that they should not be so built as materially to obstruct its commerce. If the obstructions which have been demonstrated to result from the Wheeling bridge, are to be multiplied as these cross-ways are needed, our beautiful rivers will, in a great measure, be abandoned. An experience of forty years shows how much may be done in the structure of steamboats, in the improvement of their machinery, and the propelling power, to increase the speed and the comfort of that mode of transportation, under a continued reduction of expense. But if the limit of advance, in this respect, has already been passed; and a retrograde movement is necessary, by rejecting the improvements recommended by ingenuity and experience, we close our eyes to one great source of our prosperity. What would the West now have been, if steam had not been introduced upon our rivers, and their navigation had not remained free? Without an outlet for the products of a prolific soil and the instruments of mechanical ingenuity, the country could have made but little advance.

It is said that the interest of commerce requires navigable waters

to be crossed, and that in such a case the inquiry should be, whether the benefit conferred upon commerce by the cross route, is not greater than the injury done. In the case of the *King v. Sir John Morris*, 1 Barn. & Adol. 441, it was held, that the injury cannot be balanced against the benefits secured. And in the case of the *King v. George Henry Ward*, 4 Ad. & El. 384, it was held, where the jury found that an embankment complained of was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, it amounted to a verdict of guilty.

If the obstruction be slight, as a draw in a bridge, which would be safe and convenient for the passage of vessels, it would not be regarded as a nuisance, where proper attention is given to raise the draw on the approach of vessels. Of this character is the complaint of the plaintiff against the bridge, that it obstructs sea vessels built at Pittsburg. Sails cannot be used to advantage on the Ohio or the Mississippi, consequently there can be no necessity of raising the masts until it becomes necessary to hoist the sails. Such vessels float down the river or are towed by steam-vessels.

*It is true the injury done to the State of Pennsylvania [* 578] may seem to be small, when compared to the magnitude of this subject. It applies to all our rivers, and affects annually a transportation of many millions of passengers, and a commerce worth not less than six hundred millions of dollars. It would be as unwise as it is unlawful to fetter, in any respect, this vast commerce.

In all the charters, granted for the construction of bridges over navigable waters, it is believed all the States, not excepting Virginia, have provided that their navigation should not be obstructed.

The bridge company had legal notice of the institution of the suit, and of the application for an injunction to stay their proceedings, before their cables were thrown across the river. This should have induced them to suspend, for a time, their great work, alike creditable to the enterprise of their citizens, and the genius and science of the engineer who planned the bridge and superintended its construction. It is a matter of regret that, by the prosecution and completion of the bridge, they have incurred a high responsibility.

For the reasons and facts stated, we think that the bridge obstructs the navigation of the Ohio, and that the State of Pennsylvania has been, and will be, injured in her public works, in such manner as not only to authorize the bringing of this suit, but to entitle her to the relief prayed.

Believing, from the estimates in the case, that the obstruction to the navigation of the river may be removed by elevating the bridge, at an expense which, when added to the original cost, will leave a

reasonable profit to the stockholders, on the entire capital expended, we have endeavored to ascertain the lowest point of elevation which will secure this object. And, on a full view of the evidence, we are brought to the conclusion, that an elevation of the lowest parts of the bridge for three hundred feet over the channel of the river, not less than one hundred and eleven feet from the low-water mark, will be sufficient—the flooring of the bridge descending from the *termini* of the elevation, at the rate of four feet in the hundred; this will give a level headway for boats of three hundred feet in width, and will enable those whose chimneys are eighty feet high to pass under the bridge when the water is thirty feet deep from the ground, leaving the tops of the chimneys two feet below the lowest parts of the bridge. If this or some other plan shall not be adopted which shall relieve the navigation from obstruction, on or before the 1st day of February next, the bridge must be abated.

We do not deem it necessary to provide against the floods, which seldom occur, and which, when at the highest, overwhelm the lower parts of our cities and towns on the banks of the Ohio,
[* 579] *and necessarily suspend, for a short time, business upon the river.

TANEY, C. J., dissenting.

As this is a case of much importance to the parties and the public, and I do not concur in the judgment of the court, it is my duty to express my opinion. I shall do so as briefly as I can.

The first question to be decided is, whether this bridge is a public nuisance or not, which this court has a right to abate. The State of Pennsylvania, it is true, complains of an interruption to her canals, in which, in her character as a State, she has a proprietary interest, analogous to that of an individual owner. She seeks redress for this injury. But she proceeds upon the ground that the bridge is a public nuisance, from which the State receives a particular injury to its property beyond that which the public in general sustain. And the foundation of her claim, as stated in the bill, is, that the bridge is an unlawful obstruction to the navigation of a public river, and therefore a public nuisance. The immense mass of testimony, contained in this record, is directed almost altogether to that point. In order, therefore, to maintain the bill, it is incumbent upon the State to show that this bridge is a public nuisance. And, if it is a public nuisance, it must be because it is a violation of some law which this court has a right to administer.

In examining this question, it must be borne in mind that, although the suit is brought in this court, the law of the case and the rights

of the parties are the same as if it had been brought in the circuit court of Virginia, in which the bridge is situated. Pennsylvania, as a State, has the right to sue in this court. But a suit here merely changes the forum, and does not change the law of the case or the rights of the parties. And if, in the circuit court of the United States, sitting in Virginia, this bridge could not be adjudged a nuisance, and abated as such, neither can it be done in this court. The State, in this controversy, has the same rights as an individual, and nothing more. And the court is bound to administer to the State here the same law that would be administered to an individual suitor, suing for a like cause, in a circuit court of the United States, sitting in the State where the bridge is erected.

Assuming, then, that it does obstruct a public navigable river, and would, at common law, be a public nuisance, I proceed to inquire whether this court is authorized to declare it to be such, and order it to be abated.

The Ohio being a public navigable stream, congress have undoubtedly the power to regulate commerce upon it. They have * the right to prohibit obstructions to its navigation; to de- [* 580]
clare any such obstruction a public nuisance; to direct the mode of proceeding in the courts of the United States to remove it; and to punish any one who may erect or maintain it; or it may declare what degree or description of obstruction shall be a public nuisance; as, for example, the height of a bridge over the river, or the distance to which a wharf may be extended into its navigable waters.

But this power has not been exercised. There is no law of the United States declaring an obstruction in the Ohio or any other navigable river, to be a public nuisance, and directing it to be abated as such. Nor is there any act of congress regulating the height of bridges over the river. We can derive no jurisdiction, therefore, upon this subject, from any law of the United States, and if we exercise it we must derive our authority from some other source.

But we cannot derive it from the common law. For it has been settled, since the beginning of this government, that the courts of the United States as such, have no common-law jurisdiction, civil or criminal, unless conferred upon them by act of congress. It is true that the courts of the United States, when sitting in a State, administer the common law, where it has been adopted by the State. But it is administered as the law of the State, under the authority and direction of the act of congress, which makes the laws of the State the rule of decision in a court of the United States, when sitting in the State, provided such laws are not contrary to the con-

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stitution, laws, or treaties of the United States. We cannot, under the rule of decision thus prescribed, adjudge this bridge to be a nuisance, although it may obstruct the navigation of the river, unless it is a nuisance by the common law, as adopted in Virginia, and modified by its statutes. But this bridge was built under the authority of a statute of the State. The structure, in its present form, has been sanctioned by the legislature. It is therefore no offence against the laws of the State; and a circuit court of the United States, sitting in the State and governed by its laws, when not in conflict with the constitution or laws of the United States, or treaties, could not order it to be abated as a public nuisance; and this court has no higher power over this subject, either at law or in equity, nor any other rule to guide it, than a circuit court sitting in Virginia. And as the bridge is not a nuisance by the laws of that State, and there is no act of congress making the obstruction of a public river an offence against the United States, and we have no common law to which the court may resort for jurisdiction, I do not understand by what law, or under what authority, this court can adjudge it to [* 581] be a public nuisance, and proceed to * abate it, either upon a proceeding in chancery or by a process at law.

If it is a public nuisance, it is an offence either against the United States or the State of Virginia, for which the persons who erected or who continue it, are liable to be indicted. For we need go no further than Blackstone's Commentaries, 4 Bl. Com. 167, for proof that the unauthorized obstruction of a navigable river is an offence, and may be punished in a criminal proceeding by indictment. Can the parties who built or continue this bridge be indicted for it as an offence against the public? This appears to me to be the true test. We are inquiring whether there is any law which the court has the power to administer, under which this bridge may be adjudged a public nuisance or purpresture? If there is, then the persons who erected it may be punished in a criminal proceeding.

For if it is a public nuisance or purpresture, it is an offence against the sovereignty whose laws have been violated. Could they be indicted for an offence against the United States? This will hardly be contended for, as common-law offences cannot be punished in its courts, unless they are declared offences by act of congress. And as we have no such act of congress, it is clear that an indictment charging the obstruction as an offence against the United States, could not be maintained. It is equally clear, that an indictment, charging it as an offence against the State, could not be supported, for the law of the State sanctions its construction. It may be asked, in reply to this view of the subject, is this great river then liable to be obstructed by

bridges whenever the States, through whose territory it passes, choose to authorize them? and are the inhabitants above the obstructions to be shut out from its navigation, and without redress? The argument *ab inconvenienti* would be entitled to great consideration, if there was any foundation for it, although it would not alter the law. But this opinion leads to no such result. For I have already said that congress have the power to declare the obstruction of a navigable stream an offence against the United States, and to authorize the courts of the United States to abate it as a nuisance; and any law of a State to the contrary would be unconstitutional and void.

If, therefore, there be an evil, it may easily be corrected by the legislative authority of the general government. But if congress have not thought proper, or do not think proper, to exercise this power, and public mischief has arisen, or may arise from it, it does not follow that the judicial power of the United States may step in and supply what the legislative authority has omitted to perform. It does not by any means follow that the judicial power may declare an obstruction in or over a navigable stream, "an offence [* 582] against the United States, before the legislative power has forbidden it, and conferred authority upon the courts to punish or remove it.

Undoubtedly, this court has original jurisdiction when a State is a party. But it cannot exercise that jurisdiction without some law prescribing the mode of proceeding, the rule of decision, and the evidence by which the right in dispute is to be tried. The unskilful and careless manner in which a steamboat is navigated may impede the passage of other vessels, and sometimes endanger their safety, yet if Pennsylvania sued here for any injury arising from this cause, we could exercise no jurisdiction and give no redress unless there was some law to guide us. And when a case of this kind is not embraced in any law of the United States, we always resort to the established usages of navigation on the river, and the laws of the State in whose jurisdiction the injury was sustained.

The cases in which the court has taken jurisdiction in questions of boundary between States, stand on different ground. The original jurisdiction was conferred by the constitution. The evidence upon which the right in controversy must be decided, depended upon the laws and usages of nations in disputes of that kind. Congress had no power over the subject. It could neither give nor take away the right of either party, nor prescribe the evidence by which it was to be tried. All that congress was required to do, or could do, was to authorize the court to issue the proper process to bring the parties before it, and to conduct the proceedings to final judgment. This

was admitted on all hands to be necessary before the court could exercise the jurisdiction which the constitution had conferred. And in the case of *New Jersey v. New York*, 5 Pet. 287, 288, it was held that the acts of 1789¹ and 1792² had clothed the court with the necessary power.

The rule as to navigable waters is this: Every independent nation has the exclusive jurisdiction over the navigable waters lying within its territorial limits. It has the right to regulate commerce upon them, and to determine what bridges may be built over them, or piers or wharves extended into them. And an erection authorized by the legislature cannot be a nuisance, public or private. This was the situation of the old States prior to the adoption of the constitution. Each was then an independent, sovereign State. But by the constitution of the United States, they surrendered to the general government the power to regulate commerce. And thus, while they retain their absolute territorial jurisdiction over their navigable waters in all other respects, congress may forbid the erection of any structure in a navigable stream, which it deems an obstruction to commerce, *and may declare it a nuisance, and direct it to be removed. But all the original authority of the State over the river remains subject to that limitation. For otherwise, until congress thought proper to legislate, navigation on the river would be under no control. Boats might be run down with impunity, and obstructions of every kind erected in or over it, which the State could not prevent or punish.

The bridge in question is entirely within the territory of Virginia. Prior to the adoption of the constitution of the United States, she had an unquestionable right to authorize its erection. She still possesses the same control over the river, subject to the power of congress, so far as concerns the regulation of commerce. The United States and Virginia are the only sovereignties which can exercise any power over the river where the bridge is erected. Virginia has authorized it, and congress have acquiesced in it. Congress have made no regulation declaring such a structure unlawful, or authorizing any judicial proceeding against it. If congress, to whom the power is granted to regulate commerce, have acquiesced, how can the court, to whom the power is not granted, undertake to regulate it, and declare this bridge an unlawful obstruction, and the law of Virginia unconstitutional and void? With all my respect for my brethren, I think it is an error, and I had almost said, a grave one.

If it should be said that the compact between Virginia and Kentucky makes the river free independently of the constitution, the

¹ 1 Stats. at Large, 93.

² Ib. 275.

answer is obvious. The compact does not deprive Virginia of the power to regulate the police of the river, or to authorize bridges or piers, or other structures in it. Such a compact between States has always been construed to mean nothing more than that the river shall be as free to the citizens or subjects for which the other party contracts, as it is to the citizens or subjects of the State in which it is situated. But if this compact or any compact should be construed to prohibit the erection of the bridge, the proceeding should be to enforce the observance of the compact. If erected in violation of a compact, it is still not a nuisance, because there is no law prohibiting it. It would be a breach of contract by the State, and the remedy in a very different mode of proceeding.

This compact between Virginia and Kentucky, in relation to the navigation of the Ohio, was one of the articles of agreement under which Virginia consented that Kentucky should become a separate State. Kentucky could not become a separate State without the consent of congress. But the act of congress, which gave that assent, makes no reference whatever to the terms of the agreement between the States. It does not make the United States a party to them, nor guarantee their execution. * It simply [* 584] declares its consent that the district of Kentucky should, on the 1st of June, 1792, become a State, according to its actual boundaries, on the 18th of December, 1789. The act of congress is in 1 Stats. at Large, 189, and contains no allusion whatever, direct or indirect, to the navigation of the Ohio. It leaves the compact as it was; that is, a compact between the two States, and nothing more, and to be enforced by a proceeding upon it. Nor is there any difference in the rights of navigation between the rivers and bays of the Atlantic States and those of the west. The old and the new States in this respect stand upon an equal footing. It was so decided in this court in the case of *Pollard v. Hagan*, 3 How. 212, and that decision has been sanctioned in subsequent cases, to which it is not now necessary to refer.

The complainant, however, insists that the law of the United States for enrolling and licensing coasting vessels, gives to the vessel so enrolled and licensed, the right to navigate the river free from obstructions: that this law, therefore, by necessary implication, forbids the erection of the bridge which obstructs the navigation; and consequently, defines the rights of the parties. And if a vessel is obstructed, the law is violated, and the injured party entitled to his remedy, and to have the obstruction removed. The case of *Gibbons v. Ogden*, 9 Wheat. 1, is relied on to support this proposition.

This brings up the question whether the law of Virginia, sanction-

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ing the erection of this bridge, is or is not repugnant to the constitution or laws of the United States. Is it repugnant to the clause of the constitution which gives congress the power to regulate commerce? or to any law passed under it? If it is not, then the structure complained of, being within the territory of the State, and authorized by its legislature, cannot be a public nuisance or a private nuisance in the eye of the law. Nor has any one a right to complain of it as an unlawful obstruction in his way; nor to maintain a suit at law or in equity for any inconvenience or loss he may sustain from it. Assuming that we may exercise jurisdiction on the ground that the complainant claims a right under the above-mentioned act of congress, neither the point nor the principles decided in *Gibbons v. Ogden* have, in my judgment, any application to the case before us. In that case, the legislature of New York passed a law granting to certain persons the exclusive privilege of navigating all the waters within the jurisdiction of that State with boats moved by fire or steam; and authorizing the chancellor of the State to restrain by injunction any person whatever from navigating these waters with boats of that description. The complainant claimed under [* 585] the grantees of the monopoly, and sought *by his bill to restrain the respondents from navigating the waters embraced in it. And this court held, and correctly held, that the law of the State was unconstitutional; that a vessel enrolled and licensed for the coasting trade, under an act of congress, had a right to navigate any of the navigable waters of the United States; and that no State had a right to forbid it.

There was no question, in that case, as to the authority of a court of the United States to declare an obstruction in a river, which a State had authorized, to be a public nuisance, and treat it as an offence against the United States. The waters in question were navigable, and free from impediments of that description; and the boats of the parties who claimed the exclusive privilege, were daily passing over them. The only question in the case was, whether all vessels, enrolled and licensed by congress, had not the right to pass over the same waters as freely as the vessels of the monopolists. The court said they had; that they had an equal right with the complainant to use the navigable waters of New York. But the court do not say that an obstruction placed in the water, which renders navigation inconvenient or hazardous, is a violation of the act for licensing and enrolling coasting vessels, or in conflict with it; nor do they say that this act of congress confers on the court the power to adjudge it a nuisance, and order it to be abated. There was no such question before the court. It was not in the case, nor was

the attention of the court in any way called to it by the argument.

Now, in this case, Virginia has passed no law giving exclusive privileges to navigate the Ohio River through her territory. If the bridge is an obstruction, her own citizens, engaged in the navigation of the Ohio, are equally disabled from passing as the citizens of any other State. The question, therefore, on which this case must turn, did not arise in *Gibbons v. Ogden*. But it did arise, and was expressly decided in the case of *Wilson v. The Blackbird Creek Marsh Company*, 2 Pet. 245. It was the point in the case. A dam across a navigable creek had been authorized by the legislature of Delaware, as this bridge has been authorized by the legislature of Virginia. It stopped a navigable creek, and, as the court said, must be supposed to abridge the rights of those who were accustomed to use it. So this bridge is supposed to impede the navigation of the Ohio, and abridge the rights of those accustomed to use it. Yet, in the case referred to, the court said, that as congress, in the execution of its power to regulate commerce, had passed no law to control state legislation over these small navigable creeks, the law of Delaware was not repugnant to the constitution, not being in conflict with any law of congress. It will be remembered *that the act [*586] of congress,¹ for enrolling and licensing vessels, under which *Gibbons v. Ogden* was decided, was still in force, but was regarded by the court as inapplicable to the obstruction occasioned by the dam. The result of these two cases is this. The act of congress gives to vessels enrolled and licensed under it, the right to navigate the public waters wherever they find them navigable; and any state law prohibiting it, is unconstitutional and void. And, upon this ground, the judgment of the state court of New York, which had decided otherwise, was reversed. But this act of congress has no application to an obstruction created by a dam across the navigable water, and without further legislation by congress, the law of Delaware, which authorized the dam, was constitutional and valid. And upon that ground, the judgment of the state court of Delaware, which sanctioned the obstruction, was affirmed. I can see no difference in principle between the last-mentioned case and the case at bar. There has been no further legislation by congress on that subject since that case was decided. And as the principle is the same, the decision should be the same; and the case of *Wilson v. The Blackbird Creek Marsh Company*, should, in my opinion, govern this.

It can hardly be supposed, that the circumstance that a port of entry is established on the Ohio River, above the bridge, distinguishes

¹ 1 Stat. at Large, 805.

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this case from the one referred to. The right which the act of congress gives to vessels enrolled and licensed for the coasting trade, is certainly not confined to the navigation between ports of entry. They have the right to enter any navigable creek or river which may suit their convenience, or the business and employment in which they are engaged. And any state law which forbids them to do so, or attempts to confine the right to particular persons, is unconstitutional. Any vessel enrolled and licensed had a right to proceed up Blackbird Creek as far as she found navigable water; and her right was as perfect as if a port of entry had been established at the head of navigation. Nor can the size of the creek, or the small number of vessels that used it, as compared with the Ohio, make any difference between the cases. It was the right that was in question; and that right was the same whether the navigable water was narrow or wide, or used only by a single vessel, or frequented by hundreds.

The case of *Wilson v. The Blackbird Creek Marsh Company*, 2 Pet. 245, is entitled to the more weight, because it was decided after the case of *Gibbons v. Ogden*, 9 Wheat. 1, which appears, by the report, to have been recalled to the attention of the court, and relied upon in the argument; and the opinion in the last case was delivered

by the same learned judge who delivered the elaborate opinion [*587] in the former one. It shows that he, and the learned court in which he presided, did not consider the principles on which *Gibbons v. Ogden* was decided, applicable to a case where an obstruction was placed in a navigable water, impeding, generally, the passage of vessels; and were of opinion that the courts of the United States had no jurisdiction which would authorize them to remove or abate it, or treat it as unlawful, without further legislation by congress. I think it more safe to follow their own construction of their own opinion in *Gibbons v. Ogden*, than to look for a new one.

Indeed, apart from any decisions on the subject, I cannot perceive how the mere grant of power to the legislative department of the government to regulate commerce, can give to the judicial branch the power to declare what shall, and what shall not be regarded as an unlawful obstruction; how high a bridge must be above the stream, and how far a wharf may be extended into the water, when we have no regulation of congress to guide us. Nor do I see how we can order a bridge or a wharf to be removed, unless it is in violation of some law which we are authorized to administer. In taking jurisdiction, as the law now stands, we must exercise a broad and undefinable discretion, without any certain and safe rule to guide us. And such a discretion, when men of science differ, when we are to

consider the amount and value of trade, and the number of travellers on and across the stream, the interests of communities and States sometimes supposed to be conflicting, and the proper height and form of steamboat chimneys, such a discretion appears to me much more appropriately to belong to the legislature than to the judiciary.

Besides, I think there is an insuperable objection to this proceeding in equity, even if this bridge should be regarded as a nuisance, public or private. And it appears to me to be settled law in England, as well as in this country, that chancery will not interfere by injunction where the evidence is conflicting and the injury doubtful. I do not speak of informations in chancery where the attorney-general is a party, for this is not a proceeding of that kind. But I speak of cases between individual parties, like the present one. And the rule above stated, when there is a conflict of testimony, will be found in 2 Story's Com. pp. 201 to 207, where the subject is fully examined, and the cases which have been decided referred to. And a case where there is more conflict in the testimony of men of high character and undoubted skill and knowledge could hardly be imagined, than is presented in the record before us; nor a case where the injury is more doubtful. For, after the experience of two years, we see how small the loss has been compared with the immense *trade and the multitude of steamboats, which, during that [* 588] time, have passed under it.

Neither can the jurisdiction of a court of chancery be supported upon the ground that the injury is immediate and irreparable, or that any serious embarrassments lie in the way of an action at law. The injury, after two years' experience, has not been found serious enough to lessen the navigation and commerce of the river. On the contrary, they have been continually increasing since this bridge was built. And if it be an injury for which the party is entitled to a remedy, he has a plain and adequate remedy at law; and, therefore, upon general principles of equity, and more especially under the express provisions of the act of 1789,¹ he has no right to come into chancery for relief. And if an action at law were brought by the State in the circuit court of the United States, sitting in Virginia, the proceeding at law would be as free from embarrassment and difficulty as any action at law for any injury for which the law gives a remedy. And there is no reason to suppose that the respondents are not able to answer to any amount of damage, which, upon the evidence in this case, the State of Pennsylvania might recover against them.

If it should be said, that as the legislature of Virginia have sanc-

¹ 1 Stats. at Large, 73.

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tioned the erection of this bridge, prejudices in favor of it might be supposed to influence the jury, the answer is obvious. The law would be decided by the circuit court, subject to the revision and control of this court; and we are bound to presume that a jury, in a circuit court of the United States, would do equal justice between citizens of their own State, and another State or its citizens. The constitution and laws so presume. And, certainly, this court would never act upon any apprehension that justice would not be done by a jury in any State, when summoned and impanelled according to the laws of the United States. And still less could it be induced to assume extraordinary and unusual powers from fears or suspicions of that kind.

But Pennsylvania has the right to sue in this court, or in the circuit court, at her election. She has the same right to sue here in an action at law as she has to file her bill in equity. And in an action at law brought here by *The State of Georgia v. Brailsford et al.* 3 Dall. 1, the case was tried by a jury in the same manner as if the suit had been brought in the circuit court. And the jury, brought here to try this case, would be altogether free from suspicion of bias or prejudice.

It may be said that such a proceeding here would embarrass and retard the business of this court, and would be expensive and onerous to the complainant, as the witnesses must be brought [*589] *from a distance and detained here for a considerable time.

This is true. But if the State sues in this court, instead of the circuit court, it does so by its own choice. And if the remedy at law in the forum selected is embarrassing and expensive, it has no right to complain of what is the necessary consequence of its own act; nor to go into equity to avoid difficulties at law, which arise from the nature of the forum to which the State voluntarily resorts; and certainly no inconvenience to the court could alter the law, nor give it equity jurisdiction where the law has denied it. In the language of the act of congress, Pennsylvania has in this case a plain and adequate remedy at law, and has no right, therefore, to come to the equity jurisdiction of the court, until her legal right has been established.

Indeed this case, in my view of it, pushes the jurisdiction of chancery further than has heretofore been done in England or in this country.

The bridge has been erected and completed without any previous injunction to restrain the respondents from proceeding in the work. It is charged to be a public nuisance. But Pennsylvania has no right to proceed against it solely on that account. She proceeds, and

is entitled to proceed, only for the private and particular injury to her property which this public nuisance has occasioned. If the court order it to be demolished, it is not to protect the public or any portion of the community who may be supposed to be injured by it. For the government, which represents the public, and is charged with its interests, is not before the court; and has not complained of this structure, nor sought to have it removed. Pennsylvania is the only party asking for relief; and her damage, as proved in the record, is a trivial loss of some few dollars in tolls; and the mere possibility of an annual future loss to some small amount, concerning which the testimony is vague and inconclusive, and at best but conjectural. She has no concern with the obstruction to boats with high chimneys, nor with the amount of trade from Pittsburg, or any other place, further than such evidence tends to show the bridge to be a public nuisance. The owners of steamboats, and the persons engaged in commerce, are not parties to this suit, and the State of Pennsylvania has no right to prosecute for them. She must not only show that boats with high chimneys are more profitable to the owners, and better for commerce, than those with lower ones, but she must also show that the necessity of reducing them will lessen the profits of her canals. I see no proof in the record by any means sufficient to establish that fact. And we are called upon to demolish a structure which cost more than \$200,000, to save the State of * Pennsylvania from this speculative, questionable, and [* 590] at most inconsiderable loss. It seems to me, that if the power and jurisdiction of this court were clear, and supported by precedents, yet, this court, upon settled principles of equity jurisprudence, would refuse to destroy property of so much value, and which the public, by its proper officer, does not charge to be a nuisance, merely to guard against the possibility of an inconsiderable loss by the State. It is precisely one of those cases in which the court would, at all events, require the party to establish his right at law, before he comes into equity, or to make the attorney-general a party, and give the public an opportunity of being heard, where its interest is so deeply involved.

I do not doubt the power of the court of chancery to abate a public nuisance, upon an information in chancery, to which the attorney-general is a party. But, even in a case of that kind, there must be danger of irreparable mischief, before the tardiness of the law can reach it. This is the doctrine of this court in the case of *The City of Georgetown v. The Alexandria Canal Company*, 12 Pet. 98. But such a case is not now before us. The attorney-general is not a party. Pennsylvania sues as an individual for a private right. And

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in a case of this description, I am not aware of any case entitled to be regarded as an authority in this court, where chancery ever interfered by injunction except by way of prevention, that is, to stay the contemplated structure, until it could be decided, in a proceeding to which the public was a party, whether it was a public nuisance or not. We must be careful not to confound cases of public nuisance with merely private ones. For, in the former, the public have an interest to abate it, if a nuisance, and to protect it, if it is not, and therefore have a right to be heard, whether the trial be in equity or at law.

This was evidently the opinion of this court in the case of *The City of Georgetown v. The Alexandria Canal Company*, and of Lord Eldon, in the case of *Crowder v. Tinkler*, 19 Ves. 617, therein cited, with approbation. In the last-mentioned case, where the court interfered for prevention, and not to abate a structure already completed, the chancellor placed the injunction upon the ground that the nuisance about to be erected would be attended with extreme probability of irreparable injury to the property of the plaintiffs, including also danger to their existence. And that this was clearly established in that case, before he awarded the injunction. Such is the rule upon this subject which has been sanctioned by this court. Certainly, no one of the material circumstances which existed in *Crowder v. Tinkler*, can be found in this. And if the principles decided here in the case of *The City of Georgetown v. The Alexandria* [* 591] *Canal Company*, * are recognized as the law of this court,

I can see no foundation for the injunction in the case before us. For it not only has none of the circumstances in it, upon which the injunction was granted in *Crowder v. Tinkler*, but in that case, strongly as it appealed to the preventive power of the court of chancery, the court merely suspended the erection until the question of public nuisance or not could be tried by a jury upon an indictment. It did not grant a perpetual injunction, and still less did it order what had already been constructed to be abated or removed.

So far I have considered the case upon the assumption that the bridge, upon common-law principles, might, upon the evidence, be determined to be a nuisance. And, admitting that to be the case, I think, for the reasons above stated, that in the absence of any legislation upon the subject by congress, this proceeding cannot be maintained. I shall, therefore, very briefly express my opinion on the evidence.

I am by no means prepared to say, that this bridge would be a public nuisance even at common law. The evidence of the degree in which it obstructs navigation, is exceedingly voluminous, and it is

impossible to go fully into an examination of its comparative weight, in a manner that would do justice to the subject, without making this opinion itself a volume. It is sufficient to say, that in all questions of this kind, the general convenience and interest of the public in the travel and trade across the river, as well as on its waters, must be taken into consideration. For whether it is a public nuisance or not, depends upon whether it is or is not injurious to the public. The cases in the state courts, and in the circuit courts of the United States, referred to in the argument, which I shall not stop here to examine, in my opinion maintain this doctrine. And upon principle, independently of adjudications, it cannot be otherwise. A structure which promotes the convenience of the public, cannot be a nuisance to it. And the public, whose interests are to be looked to in this case, is not the public of any particular town or district of country, or State, or States, but the great public of the whole Union. Taking this view of the question, and looking to the testimony as set forth in the record, and more especially to that unerring test, experience, which the lapse of time has afforded, I am convinced that the detriment and inconvenience to the commerce and travel on the river, is small and occasional only, while the advantages which the public derives from the passage over, are great and constant. And if the courts of the United States had common-law jurisdiction, and the question was legally before us to determine whether this bridge was a public nuisance or not, I am of opinion that it is not; and that *the advantages which the great body of the peo- [* 592] ple of the United States reap from it, outweigh the disadvantages and inconvenience sustained by the commerce and navigation of the river.

Moreover, the jurisdiction exercised in this case, is new and without precedent in this court. Bridges have been erected over many navigable rivers, and built so near the water, that vessels can pass only through a draw. Such bridges are unquestionably obstructions, and impede navigation. For, where the vessels are propelled by sails, and the wind is unfavorable, they are often detained not only for hours, but for days. The courts of the United States have never exercised jurisdiction over any of these obstructions, nor declared them to be nuisances. I should be unwilling, in a case like this, to exercise this high and delicate power without precedents to support me in analogous cases. The demolition of this bridge would occasion a heavy loss to the parties, and much inconvenience to a large portion of the community. The United States are not parties to this proceeding, and the particular injury sustained by the complainant is exceedingly small. And it is solely for the protection of her

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small, remote, contingent, and speculative interest in tolls, that this bridge is pulled down. For it must be remembered that, although we see in the testimony that injuries are alleged to have been suffered by others, yet the State of Pennsylvania is the only party to this proceeding, the only one who appears in this court as complainant, and her particular loss is the only ground on which jurisdiction is claimed, and the only injury which the court is called on to redress, or has a right to consider in this proceeding.

The testimony, too, is conflicting; men of eminence and skill, and well qualified to speak on the subject, differing widely in their testimony. And I am the more unwilling to assume this questionable jurisdiction, because the legislative department of the general government has undoubted power over the whole subject, and may regulate the height of bridges over the Ohio, and of the chimneys of steamboats when passing under them, and may, while it guards the rights of navigation in the stream, at the same time protect the rights of passage and travel over it. That department of the government has better means, too, of obtaining information, than the narrow scope of judicial proceedings can afford. It may adopt regulations by which courts of justice may be guided in an inquiry like this with some degree of certainty, instead of leaving them to the undefined discretion which must now be exercised in every case that may be brought before us, without being able to lay down any certain rule, by which this discretion may be limited. It is too near the confines of legislation; and I think the court ought not to assume it.

[* 593] * Entertaining this opinion, I must, with all the respect I feel for the judgment of my brethren, with whom it is my misfortune to differ, enter my dissent.

Mr. Justice Daniel, dissenting.

In entering upon the consideration of the case before us, the mind is at once impressed with the belief that there never has been, that there perhaps never can be brought before this tribunal, for its decision, a case of higher importance or of deeper interest than the present. The subjects which it presses upon our examination, nay, upon which the judgment of this court has been demanded, and has inevitably determined, are nothing less than,

1. The jurisdiction or authority of this court, under one of the heads of original jurisdiction, enumerated in the constitution.

2. The correct interpretation of the power of commercial regulation vested in the federal government, either exerted simply as such by that government, or as affecting the power of internal improvement in the States.

3. The policy or influence of particular regulations with respect to commerce, as these may tend to restrict it within circumscribed channels, or to promote its general activity and diffusion, by facilities operating a reasonable and just equality of right, of competition, and advantage to all.

4. The character of the proceeding complained of as a nuisance, the regularity of the proposed mode of redress, and the right of the complainant to claim the interference asked for in any mode.

The magnitude of these topics would seem in some degree to excuse, in treating them, the hazard of prolixity, and at any rate, lying as they do in the direct path to the proper survey of this case, they cannot with propriety be overstepped, without pausing upon their examination.

When, at a former period, this cause was before this court, the several topics just enumerated were cursorily adverted to by me as necessarily involved in its adjudication; and the course then adopted by the court was formally objected to, because that course seemed a premature and foregone conclusion upon facts and legal positions entering essentially into the nature of the controversy; facts and legal positions not then maturely examined and ascertained, as the order of the court at that time made, necessarily implies; and which could not, according to established precedent, and the highest adjudications, be properly investigated in the mode proposed. The subsequent proceedings upon the order of the court at the January term, 1850, have *greatly strengthened the objections [*594] assigned by me on that occasion. These proceedings have, at an almost incalculable expense to the parties, brought hither an immense mass of matter, much of which on the one hand is not within the inquiries directed by the court, whilst on the other, inquiries strictly pertinent seem to have been wholly excluded. It has placed before us a long and very learned report, to be sure, in part upon subjects entirely *dehors* the order of the court, and in other aspects of the same report, (I speak it with all respect for the highly intelligent and respectable author of that report,) palpably opposed, in my opinion, to the rational and just preponderance of the facts stated by the witnesses; a report, in fine, which leaves, in all its weight and force, the mischief of withdrawing the trial of the question of nuisance from its proper forum, in which the witnesses could have been confronted and cross-examined, and imposes upon the court the task of passing upon the credibility of those whom they have never heard nor seen. Even in matters of minor concernment, I have always been unwilling, whenever the credibility of witnesses was to be tested, to interpose between such persons and the scrutiny

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of a jury, awakened, as it is sure to be, by the vigilance of the advocate; where the essential rights and interests of great communities are at stake, I never will do so, unless constrained by irresistible authority.

Recurring now to the first head of inquiry, I contend that the complainant can have no standing here, on the ground that this court cannot, as is shown, both upon the face of the pleadings and upon the proofs, take jurisdiction of this cause. If this court can take cognizance of the cause before us, it must be in virtue of the 2d section of the 3d article of the constitution, which declares that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the supreme court shall have original jurisdiction." There is no other provision of the constitution under which original cognizance of this cause by the supreme court can be assumed. Now, to arrive at the just interpretation of this clause of the constitution, as fixing that position or interest of the State as a party, which alone creates original jurisdiction in the supreme court, it is necessary to settle the import of the word party, as connected with legal or equitable proceedings. By all correct legal intendment, this term party is applicable only to persons sustaining a direct or real interest or right in any pending litigation; an interest or right immediately affected or bound by the issues such litigation involves. This term cannot be extended to persons who may be arbitrarily and irregularly named in proceedings either at law

or in equity, the very description of whose relation to the [* 595] case shall evince a total absence of legal or equitable claims upon the subject of litigation; a total absence, too, of reciprocal duty or obligation with reference to those whose property, and whose possession and enjoyment of that property, are sought to be affected. Whilst courts of justice, therefore, will enforce the conventing of all whose interest can properly be adjudged, they will repel and even rebuke attempts to assail, or even to canvass the rights and interests of others, by those who in effect concede the want of a legal or equitable title in themselves. Courts of justice take no cognizance of imperfect rights, or such as may be termed merely moral or incidental, as distinguishable from legal or equitable, even when the existence of the former may be clearly shown. In this controversy, the State of Pennsylvania, admitted to have no property in or title to the River Ohio within the limits of Virginia, and no property in or title to the steamboats which ply upon that river, is confessedly made use of as a mean, under the shelter of her name, of redressing grievances, which, if they ever had existence, are injuries to her citizens and to individuals, and the

proper and efficient remedy for which is to be found at the suit of those citizens in the courts of the State or of the United States. The alleged right of Pennsylvania to sue in this case for a diminution of profits from her canals and other works of internal improvement within her own territory, and many miles remote from the Wheeling bridge, had it not been cast into shade by a still greater extravagance disclosed by the record, (her right of ship navigation with top-gallant royals all standing,) might have awakened some surprise; but even this tamer and less lofty pretension should fail of the end it has been designed to effect; for it cannot be pretended, and is not even intimated in the pleadings in this cause, that those canals and other public works have been obstructed or rendered in any respect less fitted for transportation, or in any way impaired by the erection of the Wheeling bridge beyond her territory, and within that of a separate and independent State. And if the mere rivalry of works of internal improvement in other States, by holding out the temptation of greater dispatch, greater safety, or any other inducement to preference for those works over the Pennsylvania canals, be a wrong, and a ground for jurisdiction here, the argument and the rule sought to be deduced therefrom should operate equally. The State of Virginia, who is constructing a railroad from the seaboard to the Ohio River at Point Pleasant, much further down that river than either Pittsburg or Wheeling, and at the cost of the longest tunnel in the world, piercing the base of the Blue Ridge Mountain, should have the right by original suit in this court against the canal companies of Pennsylvania, or against that State herself, to recover compensation for diverting any portion of the *commerce [* 596] which might seek the ocean by this shortest transit to the mouths of her canals on the Ohio, or to the city of Pittsburg; and on the like principle, the State of Pennsylvania has a just cause of action against the Baltimore and Ohio Railroad, for intercepting at Wheeling the commerce which might otherwise be constrained to seek the city of Pittsburg. The State of Pennsylvania cannot be a party to this suit on the grounds stated in the bills filed in her name, for the reason, still more cogent than any yet assigned, namely, that, to permit this, would be to render the clause in the constitution, relied on in her behalf, utterly useless, and even ridiculous; would destroy every restriction intended by the enumeration of instances of original jurisdiction, and would confound this clause with another provision of the constitution, designed to cover cases precisely like the one now before the court. If in all instances in which the citizens of one State have cause of action against a citizen or a corporation of a different State, the action can be prosecuted in

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the name of the State in which the claimant resides, although no peculiar or legal right or cause of action can be shown in such State sustaining the character of a private suitor, then the restriction as to cases of original jurisdiction is entirely abolished; the defending party, too, must be entitled to the same right of substitution, and all suits between citizens of different States might, by this process, be transformed into suits between States, or suits to which States are parties: cases of original jurisdiction in this court. That provision of the constitution designed to embrace controversies between citizens of different States is thus annulled, and the jurisdiction of the district and circuit courts transferred, as falling within its original cognizance to the supreme court. Such, to my apprehension, appears to be the inevitable result of asserting what are essentially and clearly private rights or interests, in the name of a State, or the prosecution of remote, contingent, and imperfect interests not amounting to property, though claimed on behalf of a State. I conclude, therefore, that to constitute a State a party in that sense which brings her within the meaning of the constitution, and indeed within the import of the term party to a cause, by all correct legal intendment, there must be averred and proved on her behalf, a certain and direct interest, or an injury, or a right of property—a perfect right—a right which a court of justice can define, adjudge, and enforce; and that, on the part of the State of Pennsylvania, no such right having been averred even, much less established in proof, nothing is shown which can maintain the jurisdiction of this court in this cause. The shadowy pretext of an interest or injury, from the nature of things not susceptible of calculation or estimate, can never be the [* 597] * foundation of a right, legal or equitable. And, indeed, so far as any light can be reflected by facts on this pretended or incidental interest of Pennsylvania, resulting from any supposed effect upon the tolls on her canals, an actual increase instead of a diminution of those tolls since the erection of the Wheeling bridge, is proved.

Passing from this subject of jurisdiction, and supposing it for the present to be vested here, I proceed to examine the pretensions of the complainant, as being deducible from, and as guaranteed by, the power delegated to congress to regulate commerce between the several States. The existence of that power, in its fullest extent, and for every purpose for which it has been delegated to congress, need not be questioned, in order to expose and repel the pretensions advanced for the complainant. On the contrary, the assertion of that power in its greatest latitude, so far as it was ever contemplated by those who gave it, or so far as it can be exercised for useful purposes,

carries with it necessarily, the condemnation of those pretensions. The power to regulate commerce was given to the federal government, whose functions and objects were designed to be general and co-extensive with the entire confederacy, because its duties embrace the equal rights and interests of all the members of the confederacy, and as a mean of the widest diffusion of commercial facilities and intercourse within the powers vested by the constitution. It cannot be rationally concluded that, by a provision palpably intended to protect commerce from unequal or invidious restrictions, the power was given to congress to advance so far towards restriction or monopoly as to limit commerce to particular channels; thereby crippling or wholly preventing its diffusion and activity, and, by the same process, conferring upon particular points or sections of the country, arbitrary and unjust advantages, and riveting, upon all those portions affected by such a procedure, loss and even ruin. Admitting, then, that congress had made any regulation affecting the subjects of this controversy, (and it will hereafter be shown that they have not done so,) admitting, moreover, that their acts or regulations might fall within the broad language of the power vested by the constitution, it remains still a just and fair inquiry, whether those acts which are arbitrary or oppressive, which defeat the great ends for which the power, thus perverted, may have been within the legitimate scope of the powers alleged in excuse for their performance. In other words, whether congress, as a regulation of commerce, would be justifiable in breaking down works of internal improvement within the States, though calculated in their character and tendencies for the diffusion of commerce, and by such destruction limit commerce to particular local points or * interests? Common sense and common [* 598] justice would promptly answer in the negative, and would decide that a rational and proper, nay, the only rational and proper, exercise of the regulating power in congress, demands the promotion and protection of such modes and facilities of commercial intercourse, (so far as congress have this power,) as will insure equality to all, and the widest diffusion of commercial advantage. Surely, then, in the absence of all action on the part of congress, this court should imply no policy or design in that body to fetter or cripple great interests which they are charged with the power and duty to protect. But congress have enacted no regulation whatever in relation to the subject of this controversy; they have not said that bridges should nowhere be erected over the River Ohio, or, if erected, what should be their elevation above the water; neither have they declared, upon scientific calculations or upon experiments, or on any data, what shall be the height of the chimneys of steamboats on that river, nor to

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what degrees, either from their own calculations of improvement in speed, or from fancy or local rivalry, the owners or masters of steamboats on that river may elongate the chimneys of those steamboats. Upon all these matters congress have thus far been perfectly silent.

Admitting, then, that the State of Pennsylvania can be regularly before us in the character of a party in interest, this controversy presents to us, in truth, simply a comparison between the will and the acts of the parties thereto, and an appeal to this court, in the absence of all action by congress, — by some rule which it must deduce from the common law of nuisance, to decide upon the comparative merits or demerits of the parties, — to decide whether the benefits produced by the Wheeling bridge to the surrounding country, and by its connection with extended lines of travel and commerce, can save it from the character of a nuisance. Or whether its interference, in certain stages of water, with the chimneys of seven steamboats, owned by private individuals, the height of whose chimneys is a subject of much contrariety of opinion, both amongst scientific men and practical builders and captains of steamboats — can so constitute it a public nuisance, and a cause of such direct injury to the legal rights and interests of Pennsylvania, as to justify its abatement by this court. In the absence of all action by congress in relation to this matter, in the only legitimate mode in which congress could affect it, namely, by commercial regulation, or by some express statutory declaration, the act of one of these parties in the prosecution of their interests must claim intrinsically equal authority with the acts of the other, except so far as they may have some common arbiter by whom both may be controlled. In this case, that arbiter would seem to be [* 599] either the local *sovereignty, (the State of Virginia,) within whose territory the alleged nuisance is situated, or the United States, through some enactment for the regulation of commerce; but neither of these authorities is invoked in this controversy. We have here a suit in the name of Pennsylvania, occupying the position of every private suitor, asking the action of this court upon general common-law jurisdiction over the subject of nuisances, which jurisdiction the courts of the United States do not possess. Nor is it enough to draw within our cognizance the subject of this cause, to affirm merely the competency of congress to legislate upon it, and to refer its decision, if they choose, to the federal courts. I ask upon what foundation the courts of the United States, limited and circumscribed as they are by the constitution, and by the laws which have created them and defined their jurisdiction, can, upon any speculations of public policy, assume to themselves the authority and functions of the legislative department of the government, alone

clothed with those functions by the constitution and laws, and undertake of their mere will, to supply the omissions of that department? Is it either in the language or theory of the constitution, that this court shall exercise such an auxiliary or rather guardian and paramount authority? Cannot the legislative department of the government be intrusted with the fulfilment of its peculiar duties? Such an act as this court has been called upon to perform; such an act as it has just announced as its own, is, in my opinion, virtually an act of legislation, or, in stricter propriety, (I say it not in an offensive sense,) an act of usurpation. To rest our authority to adjudicate this matter on the naked proposition just stated, would be to reject the doctrine by this court heretofore most expressly ruled. The case of *Wilson v. The Blackbird Marsh Creek Company*, 2 Pet. 245, seems to be conclusive upon this point. This case presented an instance of an absolute obstruction by a dam of a watercourse navigable by vessels of considerable size, and in which the tide ebbed and flowed. The person who undertook to destroy or injure the dam constructed across this navigable water, was the master of a vessel regularly licensed and enrolled according to the navigation laws of the United States; and being sued for a trespass committed in breaking or injuring the dam, he pleaded, in justification of his act, the character of the navigable water as a public and common highway, for all the citizens of the particular State and of the United States, to sail, pass, and repass over, through, and upon, at all times of the year, at their own free will and pleasure. Upon comparing this case with the one before us, it is impossible not to perceive that in many of their capital features, they are strikingly similar — may, indeed, be regarded as identical. In the * former case, as in this, the [* 600] watercourse said to be obstructed was a navigable water; in that case, as in this, the *locus in quo* was within the jurisdiction of a State, and the alleged obstruction, in each instance, an act of state legislation in exercising the power of internal improvement; in each instance, the right of passage to the extent and in the manner claimed, freely and at will *usque ad cælum*, was in virtue solely of license and enrolment, according to the navigation laws of the United States. Now, what said this court upon the foregoing state of the pleadings and evidence? "If congress," said they, "had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation, over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States, we should feel not much difficulty in saying, that a state law, coming in conflict with such act, would be void.

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But congress has passed no such act. The repugnancy of the state law to the constitution, is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question. We do not think that the act empowering The Blackbird Marsh Creek Company to place a dam across the creek, can, under the circumstances of the case, be repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." This decision at once puts to flight the pretext for interference here to protect and enforce the duties and functions of congress, and equally exposes the fallacy that the grant of a coasting license, of a mere certificate of the domicile of the vessel bearing it, of evidence *prima facie*, of her capacity of tonnage, or of her exemption from suspicion of smuggling or piracy, is a regulation of commerce over every inch of the waters over which, in her various excursions, she may pass. Just as cogent and tenable is the argument, if argument it deserves to be called, which affirms that the establishment of Pittsburg as a port of entry, its mere designation as a point at which merchandise may be landed subject to the revenue laws of the United States, is a positive declaration by congress, prescribing the modes of the transportation of such merchandise thither, and defining what shall be held to be an interference with such transportation. Equally, or rather more unsound and untrue, is the position that, by the same designation of Pittsburg, congress have declared that vessels propelled by wind or steam, vessels of the greatest capacity, carrying masts or chimneys of illimitable height, shall navigate a river whose ordinary regimen, to adopt a term in this record, [* 601] scarcely affords a channel broad or deep enough for the tacking of a shallop, and for long periods of a few inches only in depth. This attempt, from the mere designation of a port of entry, to bring home to congress the absurdities the argument implies, would ascribe to them a practical wisdom much upon a parallel with that of the despot who attempted to confine the Hellespont in fetters, or of him who forbade the approach to him of the ocean-tide. But congress have in truth enacted nothing in relation to the particular subject in issue in this controversy; and we have seen, in the explicit declaration of this court, in the case from 2 Pet., that not only must there be some positive enactment by congress, but an enactment "the object of which was to control state legislation over those navigable creeks into which the tide flows." But again: it has been asserted, in justification of the power claimed by the majority of the court, that congress, by adopting the act of the Virginia legislature, of December 18, 1789, authorizing the erection of Ken-

tucky into a State, have fully regulated the navigation of the Ohio River. And how is this position sustained by fact? By the 7th section of her act of 1789, Virginia declares that, so far as her own territory and that of the proposed State shall extend upon the Ohio, the navigation of that river shall be free for all the citizens of the United States. Congress, by an act passed February 4, 1791, containing two sections only, (*vide* 1 Stats. at Large, 189,) consents, by the 1st section, to the proffer of Virginia of the creation of the new State; and, by the 2d section, declares, that on the 1st day of June following, the new State, by the name of Kentucky, shall be admitted a member of the Union. These two sections comprise the entire action of congress, from which the position that has been asserted by the majority of the court is deduced. Let us try the integrity of this position by reducing it to the form of a syllogism. The major of that syllogism will consist of the fact, that Virginia, by her law of 1789, has agreed that she and the newly proposed State will permit the navigation of the Ohio within their respective limits, to all citizens of the United States. Its minor is this, — that congress have assented to the permission so declared; the conclusion attempted to be deduced is, *ergo* congress by that assent have completely regulated the navigation of the Ohio, and by inevitable implication ordained that bridges shall never be thrown across that river, except in absolute subordination to the interests or the will of the owners of steamboats upon that river. This may possibly be logic, irrefragable logic; and the failure to comprehend its consistency may arise from the infirmity of my own perceptions; but I cannot help suspecting, that an acumen, far surpassing any to which I will lay claim, would be puzzled to reconcile this process * with the [* 602] laws of induction, as prescribed by Watts, by Duncan, or by Kaimes.

The next inquiry, naturally arising in this case, an inquiry inseparably connected with the alleged obstruction by the Wheeling bridge, as constituting it a nuisance or otherwise, an inquiry equal in magnitude of interest with any other involved, relates to the policy and effects of commercial regulations, as these may tend either to the restriction of commerce, within particular channels, or to supplying auxiliaries for its prosecution, or for the promotion of its activity and diffusion by increased facilities, operating a just equality of right and competition and advantage to all. And here it may be premised, that throughout the discussion of this cause, a reigning fallacy has been assumed and urged upon the court, a fallacy, which, if successful, may subserve the grasping pretensions of the plaintiff, but which, by an enlightened view of this case, must be condemned as destruc-

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tive to the extended commercial prosperity of the country. The error assumed as the basis of the plaintiff's pretensions is this, that commerce can be prosecuted with advantage to the country, only by the channels of rivers, and in all the country intersected by the western rivers, only through the agency of steamboats; and hence is attempted the deduction in favor of the paramount privileges of steamboats, and the right claimed for this species of commercial vehicles for exemption from any limit upon the interests or the fancies of those who may own or manage them. It has been a curious and somewhat amusing incident, in the argument of this cause, that whenever any restraint upon the management of steamboats (on the Ohio) was intimated, as necessary for the protection of other essential rights, both public and private, the fixed reply of the advocate in opposition has been, that commerce demands these peculiar privileges in the owners and masters of steamboats. An obvious and stricter propriety of argument would have suggested for that reply the following language: Steamboat proprietors, local monopoly, and the peculiar views of interest, real or imaginary, of the plaintiff, supply the true origin and character of the pretensions here urged; commerce, enlightened, extended, fair, equal, prosperous, and beneficial, condemns all such pretensions; she demands that freedom, fairness, competition, and equality, which are the true and only true causes of her prosperity; and which the equalizing power vested by the constitution, was designed to insure.

Commerce, in its infancy, is of necessity chiefly confined to the channels of watercourses. Weakness, poverty, or the absence of art or science, are unable, in the earlier stages of society, to supply more eligible or efficient modes for its prosecution, or to overcome the difficulties attendant on transportation off the water.

[* 603] * Hence, we see the rude essays of commerce commencing with the raft, the canoe, or the bateau; but as wealth and population, science and art advance, we trace her operations to the magnificent ship or steamboat; each adapted to its proper theatre. Does not this very progress, and the advantages which are their concomitants, glaringly expose the folly and injustice of all attempts at the restriction of commerce to particular localities, or to particular interests, or means of circulation? Are her operations to be confined to a passage up and down the channels of watercourses, impracticable for navigation for protracted periods, and whose capacity is always dependent on the contributions of the clouds, *aviditas, cœli aut nimius imber*? Would not such a narrow policy be a proclamation to commerce, inhibiting her advancement; and to the hundreds of thousands situated without her permitted track, that the wealth, the

luxuries, and comforts of civilization and improvement, if to be enjoyed by them at all, are to be obtained only at far greater expense and labor, and in an inferior degree, than they are enjoyed by more favored classes? These positions are strikingly illustrated by the experience of our own times, and indeed of a very brief space. Thus, notwithstanding the high improvement in navigation by steam and by sails, which seems to have carried it to its greatest perfection, we see the railroad in situations where no deficiency of water and no artificial or natural obstruction to vessels exist, or are complained of, stretching its parallel course with the track of the vessel, tying together, as it were, in close contiguity, and connecting, in habit and sympathy and interest, remote sections of our extended country, which, for any aid that the navigation on our rivers could afford, must ever remain morally and physically remote. The obvious superiority of the railroad, from its unequalled speed, its greater safety, its exemption from dependence upon wind or on depth of water, but above all, its power of linking together the distant and extended regions interposed between the rivers of the country, spaces which navigation never can approach, must give it a decided preference in many respects, to every other commercial facility, and cause it to penetrate, longitudinally and latitudinally, *longe et late*, the entire surface of the country, unless arrested in its progress by the fiat of this court; for, once let it be proclaimed that the rivers of this country shall, under no circumstances of advantage to the country, be spanned by bridges, at the trivial inconvenience and cost of adapting to their elevation the chimneys of a few steamboats, even if the height of those chimneys had been clearly shown to be necessary, or certainly advantageous, (a problem nowhere solved in this record,) let this, I say, be proclaimed, and the effect above mentioned is * at [*604] once accomplished; the rapidly increasing and beneficial system of railroad communication is broken up, and a system of narrow local monopoly and inequality sustained. Whether these things shall now be done; whether, for these purposes, the citizens of this country shall be restrained in their social and business relations, and so restrained under the abused and perverted name of commerce, — are the questions which this court have been called on to decide, and which, in my view, they have affirmatively ruled. They are questions too grave, too pregnant with vital consequences, to have been decided upon the speculations of any one man living.

It was with the view, doubtless, of giving plausibility to the conclusion of the commissioner, or to the strange idea sought to be enforced in the argument for the complainant, that commerce signified only a passage up and down the Ohio, that so large a portion of the

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commissioner's report is taken up in treating, in learned phrase, of the dynamic and static capabilities of the Wheeling bridge; or, translated into plain English, the capability of that bridge to sustain heavy bodies in motion and at rest. It does not seem very easy to reconcile this part of the report with the order appointing the commissioner, and prescribing his duties. That order directed the commissioner to ascertain and report whether the Wheeling bridge was, in his opinion, an obstruction to commerce upon the Ohio; and in the event that he should so regard it, to suggest any alterations by which such obstruction might be remedied. The dynamic or static capabilities of the bridge, introduced to our notice with some parade of learning, whether it could support any weight, either in motion or at rest, were subjects altogether *dehors* the order of this court, and without the warrant and powers of the commissioner. And this difficulty is in no degree lessened by the fact, disclosed in the record, that whilst the commissioner wandered beyond his commission to pronounce upon the capabilities of the bridge for railroad transit, he rejected all the evidence, tendered by the defendants, to prove the usefulness and importance of the bridge, either to the local population or as a public and commercial facility. This irregularity in the commissioner is of no small significance, as it betrays a bias on his part, however honest, which led him to throw the weight of his opinion against the usefulness of the bridge; a fact entering essentially into its character, as being a nuisance or otherwise, and to withhold from this court evidence by which the value of his opinion might have been tested with precision. This same irregularity should have had its effect in warning this court to scrutinize the opinions of the commissioner on matters falling regularly within the scope of his commission. The evidence received, [* 605] * and that rejected on this particular point, were, perhaps, both inadmissible under the terms of the order of this court; but surely it should have been either wholly admitted or rejected on both sides.

And this brings me to the last branch of inquiry, which I have proposed to treat, namely—The character of the erection complained of; the regularity of the mode of redress proposed, and the right of the complainant to claim the interference asked for in any mode. First, then, can the Wheeling bridge, according to any correct acceptance of the term, be regarded as a nuisance? This inquiry is answered by the solution of another, which is simply this: is that bridge injurious to the rights and interests of the public, or of individuals, beyond the benefits that its erection confers on both? Common sense and consistency assure us, that to pronounce that to

be a wrong and an injury which is in reality beneficial, involves a plain absurdity ; and the language of legal definition fully sustains this conclusion of common sense ; for, according to such definition, there must be the hurt, the *nocumentum*, the *commune nocumentum*, the injury to the public right, to constitute it a public nuisance ; for, admitting the fact of injury by any act, still if, in its origin, character, and extent, it is essentially private, it may be trespass or some other form of injury, but not the public offence of nuisance. This position implies no denial of the right to show a private injury resulting from a public nuisance ; it insists only upon the necessity of showing where special or private injury is alleged as flowing from a nuisance, that nuisance in reality exists. This forces back upon us the inquiries into the nature of the offence of nuisance ; and when ascertained, against what public authority it has been committed ? I have said, that upon the plainest principles of common sense, no act in reference to the public, by which a public benefit is conferred, can be denominated a nuisance ; and I insist that the rules and conclusions of the law are in accordance with this proposition. These are forcibly stated in the case of *The King v. Russell*, 6 Barn. & Cress. particularly by Bayley, J., beginning at page 593 of the volume. That was the case of an indictment for a nuisance by the erection, in the River Tyne, of a peculiar wharf or staging, called giers or staiths, for the purpose of loading coal on board ships in the Newcastle trade. The questions before the king's bench arose upon the charge of Bayley, J., who tried the case at *nisi prius*, where his charge concluded in the following terms : " Thus, gentlemen, I apprehend I have pointed out to you the true ground on which your verdict is to be founded. If you think this (that is, the wharf or staith,) is placed not on a reasonable part of the river, that it does an unnecessary damage to * the navigation, or that this [* 606] is not of any public benefit, or that the public benefit resulting from it is not equal to the public inconvenience arising from it, then you will find a verdict for the crown ; if on these points you are of a different opinion, then for the defendants." This charge of Sir John Bayley was sustained in bank. The reasoning in support of that charge by that able judge, is given more at length than can be conveniently inserted here ; but it presents a commentary upon this question so lucid, so entirely conclusive, that I cannot forbear to extract a portion of it, as illustrating, much better than I have power to do, the doctrines for which I contend. " I submitted," says Sir John Bayley, (page 594,) " to the consideration of the jury, that if, by means of these staiths, an article of great public use found its way to the public at a lower price, and in a better state than it otherwise would,

I thought these were circumstances of public benefit, and points they might take into their consideration upon that head; and upon the best attention that I have been able to give the subject, I am bound to say I continue of that opinion. The right of the public upon the waters of a port or navigable river is not confined to the purposes of passage; trade and commerce are the chief objects, and the right of passage is chiefly subservient thereto. Unless there are facilities for loading and unloading of shipping and landing, much of the public benefit of a port is lost. In the infancy of a port, when it is first applied to the purposes of trade and commerce, unless the water by the shore be deep, the articles must be shipped in shallow water from the shore, and landed in shallow water on the shore. Breakage, and pilfering, and waste, besides the expense of boating, are some of the concomitants of such a mode. As trade advances, the inconvenience and mischief of this mode are superseded by the erection of wharves and quays, and what is perhaps an improved species of loading wharf, a staith. But upon what principle can the erection of a wharf or staith be supported? It narrows the right of passage. It occupies a space where boats before had navigated. It turns part of the waterway into solid ground; but it advances some of the purposes of a port, its trade and commerce. Is there any other legal principle upon which they can be allowed? Make an erection for pleasure, for whim, for caprice, and if it interfere in the least degree with the public right of passage, it is a nuisance. Erect it for the purposes of trade and commerce, and keep it applied to the purposes of trade and commerce, and subject to the guards with which this case was presented to the jury, the interests of commerce give it protection, and it is a justifiable erection, and not a nuisance." In accordance with this doctrine, has the law been propounded by the supreme court of New York, in the case of *The People v. [* 607] * The Rensselaer and Saratoga Railroad Company*, reported in the 15th of Wendell, page 113. That was a prosecution against the company for placing abutments and piers in the bed of the Hudson River, and erecting a bridge across it, being a public navigable river. In delivering the opinion of the court, the law of the case is thus stated by Savage, chief justice, pp. 132, 133, of the volume above mentioned. "I think I may safely say, that the power exists somewhere to erect bridges over waters which are navigable, if the wants of society require them, provided such bridges do not essentially injure the navigation of the waters they cross. Such power certainly did exist in the state legislatures before the delegation of power to the federal government by the federal constitution. It is not pretended that such a power has been delegated to the general

government, or is conveyed under the power to regulate commerce and navigation; it remains then in the state legislatures, or it exists nowhere. It does exist, because it has not been surrendered any further than such surrender may be qualifiedly implied, that is, the power to erect bridges over navigable streams must be so far surrendered as may be necessary for a free navigation upon those streams. By a free navigation, must not be understood a navigation free from such partial obstacles and impediments as the best interests of society may render necessary.

In conformity with the doctrines above quoted, and in support of the views here contended for, I might confidently appeal to the language of the judge, by whom the decision of this court has just been announced, on another occasion most explicitly and emphatically declared. Thus, in the case of *Palmer v. The Commissioners of Cayuga county*, 3 McL's C. C. R., which was an application for an injunction to prevent the construction of a drawbridge over the Cayuga River, upon the ground that it would obstruct the navigation of the river, that judge, in refusing the application, announces the following, as I conceive, unanswerable conclusions: "A toll, charged for the improvement of the navigation, would not be a tax for the use of the river in its natural state, but for the increased commercial facilities. A drawbridge across a navigable water is not an obstruction. As this would not be a work connected with the navigation of the river, no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary, to raise the draw; and as such a work may be very important in the general intercourse of the community, no doubt is entertained as to the power of the State to make the bridge. It is one of those general powers possessed by a State, for the public convenience, and may be exercised, provided it does not infringe upon the federal powers."

These positions require no comment * from me; they [* 608] commend themselves by their obvious propriety and reasonableness. I would simply remark, in connection with these positions, and as warranted by them, that any obstruction by the Wheeling bridge is of course contingent and not certain; that even were it certain, under the present elevation of the bridge, this difficulty might be prevented at a comparatively small expense and inconvenience by lowering, when necessary, the chimneys of a few steamboats for the purpose of safe and speedy passage; that this operation, like the raising of a draw, would be only momentary; and as, to use the language of the judge, the Wheeling bridge "may be a work of great importance in a general intercourse, no doubt is entertained as to the power of the State to make the bridge." It will be admitted,

I presume, that the Ohio can claim no higher privileges than those appertaining to other navigable rivers.

It follows, then, from these adjudications, not less than from the principles of common sense, that the conclusion, nuisance or no nuisance, is dependent solely upon the character of the act complained of as being noxious or beneficial to the public; and that the ascertainment of that character, where it is doubtful upon the circumstances, or where it is positively denied, is regularly an investigation of fact to be made and settled, except under circumstances of peculiar urgency, by the established proceeding of the common law in relation to all questions of fact, a trial by jury. This is the doctrine of Lord Hale in reference to this very subject of obstructions in navigable waters, as quoted from his treatise *De Portibus*, where it is said by that venerable judge: "The case of building into the water where ships or vessels might formerly have ridden, whether it be nuisance or not nuisance, is a question of fact." I will not here deny, nor is it necessary in any view to deny, that a court of equity will prevent by injunction the creation of a private injury in the nature of a nuisance, or the continuation of such an injury in a case proper for its jurisdiction. Thus, where an individual or private person is about to perform an act, or has performed an act which is palpably and notoriously in its character a nuisance, from which private and irreparable injury will ensue to others, or has accrued to others, and will continue, a court of equity, upon the admitted or notorious character of the act from which the private injury is shown to proceed, and from the irreparable character of that injury, will interpose by injunction to relieve the party injured. Such is the principle ruled by Lord Eldon, in the case of *The Attorney-General v. Cleaver*, 18 Vesey, 211, which was upon an information by private persons for private injury, though in the name of the attorney-general; and by the same judge, in the case of *Crowder v. Tinkler*, in the [* 609] *19 Vesey, 617. Such, also, I understand to be the rule laid down by this court in the case of *The City of Georgetown v. The Alexandria Canal Company*. These cases all proceed upon the grounds of the ascertained character of the act complained of on the one hand, and of the private and irreparable nature of the injury shown on the other. This is as far, it is believed, as the courts of equity have ever proceeded. They have never said that, where the act complained of was dubious in its character, as being a nuisance, or otherwise, and where that fact was a matter of contestation, they would assume jurisdiction *à priori*, or without sending the question of nuisance to be tried at law, but have ruled the reverse of this; and in the cases just quoted from Vesey, Lord Eldon declared

that he would not decide those cases until the equivocal or contested fact was settled at law. Again, it is ruled in the cases above quoted, and in many others which might be adduced, that, although the courts of equity will, in order to prevent irreparable private injury, interpose by way of injunction, that where the abatement of a public nuisance is the purpose in view, as that is an offence against the government, the attorney-general must be a party to any proceeding for such a purpose. In this case, the act complained of, if a nuisance, is a public nuisance, and is so denominated upon the record, and by the decision of the majority. Its character, however, as a nuisance in any sense is denied; and much testimony has been taken by both parties upon this contested question. The interests of Pennsylvania, who stands here in the relation of a private suitor, and the alleged injury to her private interests, are the sole foundation on which she has sought here the abatement of what she has asserted to be a public nuisance. And without the participation of any representative of the sovereignty either of the State or the federal government, without the agency of the attorney-general of the State, or of the United States, without the reference to a jury of any of the contested facts of this case, this court, in the professed exercise of original equity jurisdiction, upon affidavits, and upon the opinion of a single individual, who has been, by this court, constituted the arbiter of all questions of public policy, of law, of science, and of art, and of the competency and credibility of all the testimony in the case, have decided upon the act complained of with reference to its influence upon the rights and powers both of the United States and of the local sovereignty; upon the rights and interests of the complainant in the matter in controversy, and upon the extent of the injury, if any, done to those interests. They have, upon the same grounds, and in the like absence of the legal representative of either the state or federal sovereignty, directed a great public work, disapproved by neither of *those sovereignties, and by one of them expressly [* 610] authorized and approved, to be, in effect, demolished.

I do not deem it necessary, if it were practicable, to examine here, in detail, the cumbrous mass of statement and speculation heaped together on this record. Such a task is not requisite in order to test the accuracy of the decision pronounced in this case, or to sustain the objections to which that decision is believed to be palpably obnoxious; both these objects appear to me to be attained by regarding the character of the case as described by the plaintiff herself, and the nature and manner of the proceeding adopted by the court as a remedy for the case so presented. I will give, succinctly, however, the results to which, in my view, the court should have been led by

the facts of the case, and to which an industrious examination, at least, of the testimony has conducted my mind. Before this, however, I must be permitted to point out a striking inconsistency between the alleged ground of jurisdiction in this cause, as set forth in the pleadings, and the conclusion to which the court has been carried, and the reasons they have assigned for their conclusion. It will be remembered that the ground of jurisdiction insisted upon in this case, is the injury alleged to have been done to the State of Pennsylvania, as a private suitor, — her peculiar interest alone and none other, — for none other could give jurisdiction to this court under the constitution; yet nothing is more obvious than that the whole argument of the court is founded upon the injury inflicted by the bridge upon the owners of certain steam-packets, and upon the trade of Pittsburg. Calculations are gone into at length, to show what number of passengers and what amount of freight are carried by these particular packets; how much they would lose by being deprived of this business, or by being subjected to the inconvenience and cost of lowering their chimneys, and how much the business of Pittsburg would be injured by the obstruction complained of. Thus, the true character of this cause is betrayed in the very argument and conclusions of the court. The name and alleged interests of Pennsylvania, as a private suitor, are used to draw to this court jurisdiction of this cause; but no sooner is that jurisdiction allowed in the name of Pennsylvania, than she, and any peculiar or corporate interests she was said to possess, are at once lost sight of, and those of the steamboat owners, and the local interests of Pittsburg alone are enforced.

The results above alluded to, are as follows: 1. That the conflicting opinions of those who have been called, as men of science, to testify in this cause, establish nothing conclusively, much less [* 611] ascertain the theory contended for, that, for purposes * of economy, of rapid combustion of fuel, or for the generation and escape of steam, an extraordinary height of chimney is necessary; but leave it doubtful whether the elongation of chimneys beyond a certain altitude is not calculated to retard the escape of heated air and smoke, and also to cause inconvenience and danger to the boats that carry them. 2. That, amongst the practical men, consisting of those who have experience in constructing boats, and boilers, and other steamboat machinery, and also in commanding steamboats on the western rivers and elsewhere, the preponderance, for several reasons mentioned by them, is against the extraordinary height of chimneys. 3. That the cost incident to such a construction of chimneys, (supposing this great altitude to be advantageous,) as to admit of their being lowered, and the delay and hazard of lowering them,

are subjects of minor import; have been greatly exaggerated in the statements of some of the witnesses, and should not be weighed in competition with an important public improvement, itself a valuable and necessary commercial facility, and cannot convert such a work into a public nuisance, or, in any correct sense, an obstruction to navigation. 4. That the commissioner erred in yielding to speculation and theory, rather than to practical knowledge and experience, and to the statements of witnesses, in some instances, whose local position was calculated, though it may have been honestly and unconsciously, to influence their feelings and their judgments. With regard to the right of the plaintiff to ask the abatement of the Wheeling bridge, as a nuisance, by any mode of proceeding, I will here add another remark, which has in some degree been anticipated in preceding views in this opinion; and it is this: A nuisance, to exist at all, and emphatically a public nuisance, must be an offence against the public, or, more properly, against the government or sovereignty within whose jurisdiction it is committed. In the case before us, that sovereignty and that jurisdiction reside either in the commonwealth of Virginia, or in the federal government. If in the former, she has expressly sanctioned the act complained of; consequently, no nuisance has been committed with respect to her. If the sovereignty and jurisdiction be in the United States, it is a limited and delegated sovereignty, to be exerted in the modes and to the extent which the delegating power has prescribed. There can be no other in the government of the United States, — none resulting from the principles of the common law, as inherent in an original and perfect sovereignty. There, then, can be no nuisance with respect to the United States, except what congress shall, in the exercise of some constitutional power, declare to be such; and congress have not declared an act like that here complained of to be a *nuisance. [* 612] Upon the whole case, then, believing that Pennsylvania cannot maintain this suit, as a party, by any just interpretation of the 2d section of the 3d article of the constitution, vesting this court with original jurisdiction; believing that the power which the majority of the court have assumed cannot, in this case, be correctly derived to them from the competency of congress to regulate commerce between the several States; believing that the question of nuisance or no nuisance is intrinsically a question of fact, which, when contested, ought to be tried at law upon the circumstances of each case, and that, before the ascertainment of that fact, a court of equity cannot take cognizance either for enjoining or abating an act alleged, but not proven, to be nuisance; seeing that the commonwealth of Virginia, within whose territory and jurisdiction the

Wheeling bridge has been erected, has authorized and approved the erection of that bridge; and the United States, under the pretext of whose authority this suit has been instituted, have by no act of theirs forbidden its erection, and do not now claim to have it abated;—my opinion, upon the best lights I have been able to bring to this case, is, that the bill of the complainant should be dismissed. From these convictions, and from the sense I entertain of the almost incalculable importance of the decision of the majority of the court in this case, I find myself constrained solemnly to dissent from that decision.

Motion for another Reference.

On the above opinion being pronounced, and the two dissenting opinions, Mr. *Johnson*, of counsel for defendants, suggested to the court, that the engineer of the bridge had informed him that the obstruction to the navigation of the Ohio might be avoided by making a draw in the suspension bridge, or in some other manner, far less expensive to the Bridge Company, and equally convenient to the public, than by elevating the bridge, as required in the opinion.

On this suggestion, the court observed, that, as they were desirous of having the obstruction removed in a manner that shall be most convenient and least expensive to the Bridge Company, they requested the counsel to file, in writing, his suggestions, and give notice to the other side, that both parties may be heard in regard to them.

In pursuance of the above suggestion from the court, the counsel for the Bridge Company filed their suggestions in writing, and an argument took place. Afterwards, Mr. Justice M'Lean delivered the following opinion of the court.

[* 613]

** Order of Reference.*

In pursuance of the intimation of the court, the counsel for the defendants filed, in writing, five plans for the removal of the obstruction to navigation occasioned by the bridge.

1. To elevate it, as required by the opinion of the court.
2. To remove the wooden bridge over the western channel of the river.
3. To remove the flooring of the suspension-bridge, so that the tallest chimneys may pass under the cables.
4. To construct a draw in the wooden bridge over the western channel.
5. To make a draw in the suspension-bridge.

It is objected by the complainant's counsel, that, after a case has

been argued upon the evidence, and the opinion of the court pronounced, it is not within any known rules of chancery proceeding to hear additional evidence, with the view of modifying, in any respect, the decree. That some of the plans now proposed were not embraced by the pleadings or evidence in the case, and that the effect must be to open the case for additional evidence and a new argument.

The bill alleged the bridge to be an obstruction to the navigation of the Ohio, and prayed that it might be abated as a nuisance. The answer denied that it was an obstruction to navigation.

The commissioner was directed to inquire, "if an obstruction be made to appear, what change or alteration in the construction and existing condition of the said bridge, if any, can be made, consistent with the continuance of the same across said river, that will remove the obstruction to the free navigation."

In the opinion of the court, the bridge is an obstruction to the navigation of the river, and they held, that an elevation of it one hundred and eleven feet from low-water mark, the width of three hundred feet across the channel of the river, would remove the obstruction. Except the elevation of the bridge, no mode was proposed by the commissioner, for the removal of the obstruction. His instructions limited him to a "change or alteration in the bridge," which should effectuate that object. Several of the plans now proposed, were not within the scope of his inquiry, and of course were not embraced by his report.

In giving relief, the court are not bound to abate the nuisance, as prayed for in the bill, nor to adopt the report of the commissioner, if the obstruction can be removed and the public right maintained with less expense to the bridge company. This is a matter within the judgment of the court, and does not necessarily constitute a part of the pleadings.

* It is suggested that the elevation of the bridge, as re- [* 614] quired in the opinion of the court, must result in its abatement, as the stockholders have not the pecuniary means of elevating it. Whatever may be the consequences to the stockholders, a great public right cannot be made subservient to their interests. Subject to that right, the court will regard and protect their interests.

The second plan, which proposed to remove the bridge over the western channel of the river, we shall refer to the engineer who acted under the commissioner, and who is familiar with all the facts, and having his surveys before him, can give promptly to the court the information they desire.

To remove the flooring of the bridge, as proposed in the third

plan, leaving the cables in their present position, seems to have no other practical result than the sale of the cables.

The third and fourth plans propose to construct a draw for the passage of boats, in the suspension, or the western bridge.

Draws are common in bridges across arms of the sea where the tide ebbs and flows, for the passage of sea vessels, and also in bridges over rivers with a sluggish current; but we entertain great doubts whether a draw in either of the bridges, as proposed, can be constructed so as to afford "a convenient and safe passage" for the steamboats that ply upon the Ohio. Some of them are about two hundred and fifty feet long, and from fifty to sixty feet in width. The current in the Ohio, at high water, is from five to six miles an hour. A steamboat, to be under the command of the helm, must have a pressure of steam, which, with the current, would give it a considerable velocity in passing the draw, and any deviation from the direct line by the wind, the eddies and currents of the river, in high water, might throw the boat against the bridge on either side. This might be fatal to the boat and to the lives of its passengers; and the danger would be greatly increased by attempting to pass the draw at night, especially when the weather is unfavorable to navigation.

Jonathan Knight, an engineer, called by the defendants, before the commissioner, said: "My opinion is, decidedly, it would be better to pass under (the bridge) by lowering chimneys, than to have a draw; that it would be less dangerous and take less time." And he further states, "where there is a draw, the space is necessarily contracted, and it might strike on the one side or the other, or the wind might be adverse."

The report of the commissioner contains a report of Charles Ellet, "on a railway suspension bridge across the Connecticut (River) at Middletown," in which he says, "the flooring (of the bridge) is to be placed one hundred and forty feet above the river, and the navigation left entirely unobstructed." And he recommends "a [* 615] high level to avoid" "the injury to the public consequent * on delays at the draw." In the same report he observes: "No party would now be so idle as to ask to place a drawbridge across the Ohio or Mississippi; no law could be obtained for such an obstruction, and nothing is hazarded by the assertion that such a nuisance would be immediately overthrown, if placed there under the color of any law. The bridges that are established on those streams, must be placed high enough to clear the steamboats, and must leave the channel open."

We shall direct the decree drawn up in pursuance of the opinion of the court, which affords to the stockholders of the bridge the alter-

native of elevating it, and thereby removing the obstruction to the navigation of the river, to be filed but not recorded, until the engineer or the commissioner shall report upon the second, third, fourth, and fifth plans proposed by defendants' counsel. Notwithstanding the above intimations in regard to a draw, we are desirous of having the report of a practical and scientific engineer on that subject, as well as in relation to the other plans.

It is therefore ordered, that the clerk of this court transmit to William J. McAlpine, Esquire, a copy of this opinion, with a request that he make a report to this court, on or before the second Monday of May next,—

1. Whether a draw can be constructed in the suspension bridge, that shall afford a safe and convenient passage for the largest class of steamboats which ply to Pittsburg, having chimneys eighty feet high, at a depth of water thirty feet from the ground; and, if such a draw be practicable, that he give a particular description in what manner and of what dimensions it must be constructed.

2. Whether such a draw may be constructed in the wooden bridge over the western channel of the river.

3. Whether the removal of the western bridge will open an unobstructed channel for the packets which now pass Wheeling, having chimneys eighty feet high, at all times when they shall not be able to pass under the suspension bridge.

4. Whether the removal of the flooring of the bridge, as proposed, will enable packets to pass having chimneys eighty feet high.

In obedience to this order of the court, Mr. McAlpine filed the following report.

To the honorable Roger B. Taney, chief justice; John McLean, James M. Wayne, John Catron, John McKinley, Peter V. Daniel, Samuel Nelson, Robert C. Grier, and Benjamin R. Curtis, associate justices of the supreme court of the United States.

In pursuance of the order of the supreme court of the
 * United States, dated the first day of March, 1852, a copy [* 616]
 of which has been furnished by the clerk of the said court,
 dated the third day of March, 1852, I, William J. McAlpine, do make
 the following report on the several matters directed in the said order,
 as follows:—

1. Whether a draw can be constructed in the suspension bridge that shall afford a safe and convenient passage for the largest class of steamboats which ply to Pittsburg, having chimneys eighty feet high, at a depth of water thirty feet from the ground; and if such a

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draw be practicable, that he give a particular description in what manner, and of what dimensions, it must be constructed.

2. Whether such a draw may be constructed in the wooden bridge over the western channel of the river.

3. Whether the removal of the western bridge will open an unobstructed channel for the packets which now pass Wheeling, having chimneys eighty feet high, at all times, when they shall not be able to pass under the suspension bridge.

4. Whether the removal of the flooring of the bridge, as proposed, will enable packets to pass having chimneys eighty feet high.

The largest class of steamboats which ply to Pittsburg are the daily packets, which are from fifty-four to fifty-eight feet in width, and from two hundred and fifteen to two hundred and sixty-four feet in length.

In a direct channel, with a moderate current, and in favorable weather, a draw of one hundred feet in width would, with skilful navigation, be sufficient for the safe and convenient passage of such vessels.

In the high stages of water in the Ohio River at Wheeling, the velocity of the current is from five to six miles an hour. A steamboat, in passing down the river, must have an additional velocity to keep her under the command of the helm, so that she must pass the draw with a velocity of from eight to ten miles per hour; and this speed would be less than the ordinary velocity of the vessel in other parts of the river.

In stormy weather, with the wind blowing across the current of the river, it would be difficult for a steamboat, of the size above stated, to pass without considerably more allowance than would be provided for in a draw of one hundred feet in width.

At such times, the danger of passing the draw at night would be much increased, and it would be necessary to maintain lights on each side of the draw to guide the pilots in the proper direction to pass it.

Under the ordinary circumstances of high water, a draw of at least one hundred and fifty feet in width would be necessary, [* 617] * and one of two hundred feet in width to pass at night with safety.

In dark, stormy nights, and with a rapid current in the river, the hazard of a passage would be so great that vessels would probably be laid by, rather than risk the dangers of the passage of a draw of less than three hundred feet in width.

From the accompanying drawing of the present suspension bridge at Wheeling, it will be seen that a draw cannot be placed in the

eastern end of the bridge which will give a clear passage way, beneath the cables, for steamboats having chimneys eighty feet high, at a depth of water thirty feet above the ground, of one hundred feet in width.

At the western end of the bridge, adjoining the western abutment, a draw may be placed, which will give a passage for such vessels in a thirty feet stage of water, of nearly one hundred feet in width.

In reply, therefore, to the first question of the court, I have to state that a draw of sufficient width for the safe and convenient passage of steamboats of the dimensions stated, cannot be constructed in the present bridge.

In a five feet stage of water, such a vessel would have a space of ninety-six feet in width, adjoining the eastern shore, to pass beneath the flooring of the present bridge, and in a six feet stage a width of one hundred and twelve feet.

At any stage of water higher than six feet, the width of passage would be reduced in consequence of the steep inclination of the eastern bank of the river.

In a five feet stage of water, vessels drawing four feet would strike the bed of the river on the western shore, at a point eight hundred and eighty feet from the face of the eastern abutment.

A steamboat with a chimney eighty feet high would, (allowing two feet for clearance,) on a five feet stage of water, in extremely warm weather, clear the cable at a point six hundred and seventy-one feet from the face of the eastern abutment, which leaves a clear passage way of two hundred and nine feet in width.

In a six feet stage of water, the vessel would strike the bed of the river at nine hundred feet, and the chimney would clear at six hundred and eighty-five feet; which leaves a clear passage of two hundred and fifteen feet in width.

In a seven feet stage of water, the vessel would strike the bed at nine hundred and eighteen feet, and the chimney would clear at six hundred and ninety-seven feet, leaving a passageway of two hundred and twenty-one feet in width.

In an eight feet stage of water, the vessel would strike the bed of the river at nine hundred and twenty-two feet, and [* 618] the chimney would clear at seven hundred and nine feet, leaving a passage of two hundred and thirteen feet.

In a nine feet stage of water, the vessel would strike the bed of the river at nine hundred and twenty-six feet, and the chimney would clear at seven hundred and nineteen feet, leaving a passage of two hundred and seven feet.

In a ten feet stage of water, the vessel would strike the bed of the

river at nine hundred and thirty feet, and the chimney would clear at seven hundred and twenty-nine feet, leaving a passage of two hundred and one feet.

In an eleven feet stage of water, the vessel would strike the bed of the river at nine hundred and thirty-four feet, and the chimney would clear at seven hundred and thirty-nine feet, leaving a passage of one hundred and ninety-five feet.

In a twelve feet stage of water, the vessel would strike the bed of the river at nine hundred and thirty-eight feet, and the chimney would clear at seven hundred and forty-nine feet, leaving a passage of one hundred and eighty-nine feet.

In a thirteen feet stage of water, the vessel would strike the bed of the river at nine hundred and forty-two feet, and the chimney would clear at seven hundred and fifty-nine feet, leaving a passage of one hundred and eighty-three feet.

From the accompanying chart, it will be seen that the shoal which makes into the river from the west shore above the bridge, would render it difficult for a vessel to enter the draw on a six feet stage of water, unless its eastern end were located at least three hundred feet from the western abutment, and then the passage way under the bridge, clear of the bottom of the river and cable, would be two hundred and fifteen feet in width.

It is necessary that the draw should be arranged for this stage of water, because a vessel could not then pass under the flooring of the eastern end of the bridge, with a sufficient width of clear space.

For each foot that the water rises, the passage way is thrown about ten feet to the west, and its width is diminished about six feet.

In an eighteen feet stage of water, the chimney would clear the cables at a point seven hundred and eighty-three feet from the face of the eastern abutment, which would leave a clear space of one hundred and ninety-three feet in width.

In a thirty feet stage, the chimney would clear at eight hundred and sixty-six feet, leaving a space of one hundred and ten feet.

The draw would, therefore, require to be made at least three hundred feet long, from the face of the western abutment, to
 [* 619] * allow the passage of steamboats of the dimensions stated, in the several stages of water, from six to thirty feet in depth.

It is, in my opinion, impracticable to construct so large a draw in a suspension bridge, because, from its flexible character, and the constant change of position of its cables, which would be caused by the movement of a mass of so great weight as the draw, it would not admit of the adaptation of machinery for its movement.

A draw of this length might be constructed in the Wheeling suspension bridge, by erecting a pier in the river at the eastern end of the draw, and carrying the cables over the top of it, in the manner suggested by Colonel Long, in his testimony before the commissioner, and suspending the draw from a strong permanent bridge, elevated on the top of the new pier and abutment of the present bridge, similar to the tubular bridges recently constructed across the Conway and Menai Straits, in Great Britain. The cost of constructing such a draw, and of the necessary alterations of the bridge, would exceed the cost of elevating it to the height stated in the order of the court.

The inconvenience of the approach to a draw placed in this position, and the uncertainty of its successful operation and maintenance under all circumstances of weather, exposed to winds, and with its machinery liable to be deranged by frost, or by the accidental encounter with passing vessels, render the utility of the plan, in my opinion, so doubtful, that any further detail of its arrangement is deemed unnecessary.

A draw can be constructed in the wooden bridge over the western channel of the river, which will, under ordinary circumstances, offer a safe and convenient passage for the largest class of steamboats which ply to Pittsburg. This bridge consists of three spans, each of 200 feet in length. A drawing is herewith sent, which exhibits a plan of a draw placed in the centre span of the bridge, which opens a clear space of 200 feet.

The plan of this draw is similar to one which has been constructed on the London and Brighton Railroad, which has a single draw, moving in one direction, of sixty-six feet in length.

The plan proposed for the Wheeling bridge is in two parts, opening in the centre, and moving back on the floor of the present bridge. Each draw will open 100 feet, (being thirty-four feet more than the single draw above mentioned,) and making the whole opening 200 feet, equal to the space between the centre piers.

The plan proposed will require the removal of the roof, and the centre trusses of the end spans of the present bridge, to allow the draws to move back on the floors. The draws to be
* timber; truss frames, each 200 feet long, the ends supported by timber suspenders from the top of a well-braced centre frame; the land ends of the draws to be loaded sufficiently to balance the projecting portion of the same. When the draws are closed, the ends are to be secured together with iron pins passing through iron straps, and the land ends fastened to the end spans of the permanent bridge in a similar manner. When the bridge is thus

closed and secured, it will form a perfect suspension bridge of 200 feet span.

The draws will be moved on wheels moving on iron rails, laid on the floor of the end spans, which will require to be strengthened by additional timbers. The trusses should also be strengthened with arch ribs and timbers to support the additional weight of the draws.

The draws to be moved by gearing placed in the piers, working into a rack on the underside of the drawbridge frame; the gearings moved by a capstan placed on the side of the bridge over the piers. The capstan may be worked by man or horse power.

The floor of the draw will be two and a half feet above the floor of the permanent bridge, which may be overcome by a light platform, attached to the end of the draw, that would move with the draw when opening or closing.

The cost of removing the centre span of the permanent bridge, strengthening the side or end spans, and constructing the drawbridge, is estimated at thirty-three thousand and twenty-three dollars and sixty cents, (\$33,023.60.)

It is proper that I should state that there would be some difficulty experienced in the opening of this, or any other practicable draw, during very strong gales of wind, and at such times some delays would unavoidably occur in the passage of vessels.

The present bridge over the western channel would not admit of the construction of a draw of more than 200 feet in width, without the expenditure of a sum nearly as great as that required for the construction of a new bridge.

A draw of 300 feet in width may be constructed, either in the present bridge, or in a new bridge over the western channel, in the same manner as before stated, at the western end of the suspension bridge.

The expense of the construction of such a draw would exceed the cost of elevating the suspension bridge to the height stated in the order of the court, and there would be the same difficulties in operating and maintaining it as have been before stated.

In my opinion, no draw can be constructed in either of the bridges at Wheeling, which would produce no delay, and present
[* 621] * no obstruction to the safe and convenient passage, at all times, of the largest class of steamboats which navigate the Ohio River at Wheeling.

In reply to the third question of the court, I have to state, that the removal of the western bridge will open an unobstructed channel for the packets which now pass Wheeling, when the water is six feet deep on the Wheeling bar.

It has been previously stated that steamboats, with chimneys eighty

feet high, will have a passage-way under the flooring of the suspension bridge of ninety-six feet in width in a five feet stage of water, and of 112 feet in a six feet stage.

By removing the obstructions in the western channel, which are now caused by a bar at the north end of Zane's Island, an unobstructed channel can be obtained for such vessels at all times when they cannot pass under the suspension bridge.

A chart is herewith sent, which exhibits the obstructions of the western channel.

In reply to the fourth question of the court, it is proper to state, that from the preceding report it will be seen that the removal of the flooring of the suspension bridge will enable packets to pass under the cables, having chimneys eighty feet high, the clear width of the passage being, as before stated, from 110 to 221 feet in width, depending upon the stage of water in the river.

The naked cables would afford no guide to direct the passage of vessels to the point at which the chimneys would clear the cables on the one side, and not strike the bottom of the river on the other side.

It would be necessary to suspend lights on the cables during the night to indicate the passage.

In high stages of the water, and during the night, the passage of vessels of the size stated would be attended with difficulty and danger, in consequence of the narrowness of the space, and of its being out of the main channel of the river. Respectfully submitted,

WILLIAM J. McALPINE.

Albany, May 8, 1852.

This report was made the subject of another argument, in consequence of exceptions to it being filed by *Campbell*, the attorney general of Pennsylvania, and *Stanton*, also of counsel for the complainant. The report of the case has already been extended to such an unusual length, that the reporter cannot find room to notice the arguments of the respective counsel upon the exceptions.

* M'LEAN, J., delivered the opinion of the court. [* 622]

The plans lately proposed, through defendant's counsel, to obviate the obstructions to the navigation of the Ohio River, by reason of the Wheeling bridge, complained of by the plaintiff, having been referred to William J. McAlpine, Esquire, civil engineer, he reports :—

That a draw cannot be made in the suspension bridge which shall afford a safe and convenient passage for the largest class of steamboats, which ply from Pittsburg, having chimneys eighty feet high,

on a depth of water thirty feet from the ground. And he reports that a draw can be constructed in the wooden bridge over the western channel of the river, which will, under ordinary circumstances, offer a safe and convenient passage for such boats.

That bridge, he states, consists of three spans, each of 200 feet in length; and he proposes that the draw shall be placed in the centre span of the bridge, which will open a clear space of 200 feet. He also reports, in answer to the third question of the court, "that the removal of the western bridge will open an obstructed channel for the packets which now pass Wheeling, when the water is six feet deep on the Wheeling bar."

On this report the parties have been heard.

The counsel for the defendants complain that no notice was given to them, of the late action of the engineer. A notice was unnecessary. The proposed plans were submitted by the defendants, and they were referred to the engineer, who acted under the commissioner; and who, having made the surveys and reports, was in possession of all the evidence necessary to give the required information to the court. He had only to look into his own work for the data to make the additional report in regard to both bridges and the two channels of the river, over which they have been constructed. His opinion as to a draw and the other matters referred to him, were strictly within the line of his profession. No act done under the late reference was open for investigation by proof, or subject to be influenced by argument. The presence of the parties by their counsel was neither necessary nor desirable, and notice to the defendant was not, therefore, required to be given.

By the reference, the court did not intend to make the opinion of the engineer the immediate basis of a final decree. They were desirous of ascertaining all the facts which could have a bearing in the decision of the case. They were fully impressed with its high importance to the public and to the defendants. And, whilst a high sense of duty required them to maintain the public right, they were solicitous, as expressed in their former opinion, to do so, with the least possible expense to the defendants.

[*623] * In their former opinion nothing was said, from which an inference could be drawn, that the right of crossing the Ohio River by bridges, was incompatible with its navigation. Had this bridge been constructed, in the language of its charter, so "as not to obstruct the navigation of the Ohio in the usual manner, by steamboats and other crafts, as are now commonly accustomed to navigate the same, when the river shall be as high as the highest floods hereinbefore known," this suit could never have been instituted. The char-

ter was granted in 1847, long after the great floods in 1832, and in subsequent years.

The right of navigating the Ohio River, or any other river in our country, does not necessarily conflict with the right of bridging it. But these rights can only be maintained when they are so exercised as not to be incompatible with each other. It is in their improper exercise, and not in their nature, that any incompatibility exists.

We can derive but little instruction on this subject, from European experience and practice. The rivers on that continent are generally diminutive, and of no very great length. They do not compare with the great rivers of the west. The bridges on the Rhine are numerous, and most, if not all of them, have draws, through which boats are continually passing. But their boats are small, with low and light chimneys, and some, if not many of the bridges, rest upon the surface of the water. A boat of two hundred and ninety-five feet in length, as The Pittsburg, it is believed, is not to be found engaged in inland river navigation in Europe.

The report now before us, in its outlines, is not objected to by the defendants. On the contrary, they ask the court to sanction it, leaving open its details. In their former opinion, after stating the elevation which must be given to the suspension bridge to remove the obstruction, the court say: "If this, or some other plan, shall not be adopted, which shall relieve the navigation from obstruction, on or before the first day of February next, the bridge must be abated." It was supposed that some plan might be suggested to remove the obstruction, at less expense than the elevation or abatement of the bridge. The court had before them only the general plan for relief reported by the commissioner. Under such circumstances, they felt themselves bound to receive and refer the propositions submitted by the defendants' counsel. The affirmative action on these propositions belong to the defendants; and also the eventual responsibility.

The court think that the report of the engineer, in its general aspect, without examining its details, affords such probability of success as to entitle the defendants to the proposed experiment.

* We look to the desired results, and not to the practicability [* 624] and efficiency of the plan. Of these the defendants must judge. They have the means of ascertaining, with the utmost accuracy, whether a channel can be opened, in the western branch of the river, so as to afford a safe and an unobstructed navigation for the largest class of boats, having chimneys eighty feet high, when they cannot pass under the suspension bridge. This is the object desired, and any thing short of this would not be satisfactory.

When the subject of a draw was first suggested to the court, it

was intimated that no draw was known which exceeded seventy feet in width, but it was supposed that one of eighty feet might be constructed. And the court then said, "we entertain great doubts whether a draw in either of the bridges, as proposed, can be constructed so as to afford a convenient passage for the steamboats that ply upon the Ohio River." A draw of two hundred feet in the clear is now proposed, and one less than that would not answer the public demand.

The court will not now examine, whether there be not in the western channel other obstructions than the bridge. If such obstruction exist, of whatsoever nature, they must be known to the defendants, and must be removed.

With these general remarks, the court will leave the defendants free in the matter, to act as their own judgments shall dictate.

The elevation of the bridge, in pursuance of the report of the commissioner, was ordered by the court, as the best mode of removing the obstruction, suggested by the evidence. The abatement of the nuisance was the most direct and ordinary mode for giving relief in such cases. The alternative of elevating the bridge was adopted, from considerations connected with the interests of the defendants, and the accommodation of the public. The same views have influenced us, in relation to the proposition now before us. We do not sanction them further than to leave them to the defendants, to work out and secure, if they shall think proper, the required results, as stated in this opinion. The inconsiderable delay of two or three minutes in passing the draw, and running the increased distance of the western channel, does not constitute a material objection. From the statement made, the increase of time would be less than is ordinarily consumed in the landing or receiving a passenger at the shore.

The objection, that the navigation of the eastern channel of the river has been improved by the government, and that the plaintiff has a right to its unobstructed use, is admitted to have much force.

[*625] * In the multitudinous concerns of commerce, we must view things practically, and cannot deal in abstractions. It is not always in the discretion of a court to measure justice by doing or requiring to be done the exact thing which would seem to be most appropriate. Cases may arise in which great interests are involved, that may have had their origin in wrongful acts, yet connected with circumstances which render it extremely difficult, if not impracticable, to do the thing, or cause it to be done, which is most fit and proper. In such cases, as in the law of mechanics, equivalents are of necessity substituted. And if the thing done be all that justice

can require, it may suffice. Such, is not unfrequently the necessary action of a court of chancery.

If the western channel of the river shall be made to afford an equally safe and unobstructed passage for boats, as the eastern channel, before the structure of the suspension bridge, excepting the mere passage of the draw, and the increased distance, no appreciable injury is done to commerce.

The court will direct the decree which has been filed, and which required the bridge to be elevated, as therein specified, on or before the first day of February next to be recorded, and that it shall stand as the order of this court, unless before that time the western channel of the river shall be made by the defendants, to afford an unobstructed passage to boats of the largest class which ply to Pittsburg, agreeably to this opinion; and leave is given to either party to move the court in relation to this matter, on the first Monday of February next.

The costs of this suit are ordered to be paid by the defendants.

Decree. This cause having been heard in February last, and the opinion of the court pronounced; on the suggestions of the defendants' counsel, a reference on certain points was made to William J. McAlpine, whose report having been made and arguments heard from the counsel on both sides at the adjourned term, in May, 1852, the cause stands for a final decree, on the original bill, the amendments thereto, the answers of respondents, and replications to said answers; and on the proofs in the cause, together with the report of the commissioner appointed by this court to examine the premises, and on the exceptions to said report, when it appeared, that the respondents, in the year 1849, had erected a suspension bridge, supported by iron-wire cables, across that portion of the River Ohio lying between the city of Wheeling and Zane's Island, by virtue of a charter granted by the commonwealth of Virginia, the span of said bridge being over one thousand feet long; and it also appeared that across the *other channel of the river west [* 626] of Zane's Island, there is a truss bridge, so constructed as altogether to prevent the passage of steamboats through that channel, which bridge is owned and maintained by the defendants. And it further appeared that the suspension bridge over the channel of the river east of the island, is so near the flow of the water in its ordinary stages, as seriously to hinder and obstruct the largest class of steamboats from passing and repassing under said bridge, in going to and returning from the port of Pittsburg, in the State of Pennsylvania; that large and expensive public improvements made by, and the property of that State, consisting of canals connecting railroads, turnpike roads

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and slackwater navigation in said State, constructed years before the said suspension bridge was erected, all of which improvements terminate at Pittsburg, on the Ohio River, and extend throughout the State of Pennsylvania, to the east and north, connecting the city of Philadelphia, in said State, and Lake Erie with the River Ohio. That a large commerce for several years has been and now is carried on over these public works of internal improvement, on which Pennsylvania levies reasonable tolls to maintain said works, and to compensate her for their erection. That said bridge imposes serious obstructions to the largest class of vessels propelled by steam, and which bring freight and passengers from below said bridge, and which freight and passengers are intended to pass east and north over the canals and railroads of Pennsylvania, or to be conveyed down the Ohio River, having been transported on the public works of Pennsylvania, a portion of which commerce has been hindered and prevented, and hereafter must be hindered and prevented from passing over the public works of that State, because of obstructions to navigation interposed by said bridge. That the said Ohio River is a navigable stream, the navigation whereof by law is free to all citizens of the United States, and ought to remain unobstructed; and that the said suspension bridge not only obstructs and hinders navigation on said river, but by means of such obstructions does occasion a special damage to the said State of Pennsylvania as aforesaid, for which there is not a plain and an adequate remedy at law, but on the contrary thereof, such injury is irreparable by an action or actions at common law.

It is, therefore, decreed and adjudged that said suspension bridge is an obstruction and nuisance, and that the complainant has a just and legal right to have the navigation of the said river made free, either by the abatement or elevation of the bridge, so that it will cease to be an obstruction, in ordinary stages of high water, to the largest class of steam-vessels now navigating the Ohio [* 627] River; and which alteration is hereby declared *to be an elevation of said suspension bridge, to the height of one hundred and eleven feet at least, in its undermost parts, above the low-water mark, by the Wheeling gauge of the Ohio's water; and that the height of said one hundred and eleven feet shall be maintained to the extent of three hundred and eleven feet on a level headway over the channel of the said river. And that, from the respective ends of said headway, of three hundred feet, to the abutments of each end of the bridge, the descent shall not exceed at the rate of four feet fall to every hundred feet of extension on the line of the bridge; and that the same shall be removed by respondents, or

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altered, as above stated, on or before the first day of February, 1853.

Since the above decree was drawn, certain propositions having been made by the defendants to open an unobstructed navigation for boats of the largest class, which ply to Pittsburg, through the western channel of the river, as is more particularly stated in the last opinion of the court in this case, which may avoid the obstructions by reason of the bridge complained of by the plaintiffs; and, as time has been given, to the first Monday of February next, for the defendants, should they deem proper, to carry out their propositions, by removing all obstructions in the western channel, on which day the plaintiff may move the court on the subject of the decree, and of the proposed alterations in the western channel, which, being before the court, will enable them to act in the premises as the law and the equity of the case may require.

The court order the costs to be paid by defendants.

Taney, C. J., and Daniel, J., dissented.

Opinion of Mr. Justice Daniel and Mr. Chief Justice Taney.

When this case was formerly before us, my opinion was expressed at length against the right of this court to take jurisdiction thereof. My opinion upon this question remains unchanged; but the court having taken jurisdiction, I do not conceive that my objection to the cognizance by the court of this controversy forbids my concurrence in any modification of the decree originally proposed in this case, calculated to relieve the defendants from the operation of exactions, believed by me to be unwarranted by law. I, therefore, concur in the proposed modification of the former decree, by which a draw is authorized in the bridge over the western branch of the River Ohio. I think, however, that the length prescribed by this court for the draw, is greater than the public exigencies require, and that
*a draw of one hundred feet, at the utmost, would be ample [* 628]
to meet those exigencies. It is also my opinion, that the costs in this cause should be equally borne by the parties.

Taney, C. J., also dissented, concurring in the opinion of Daniel, J.

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The drawer of bills, who was the principal debtor, for the purpose of relieving the accommodation acceptor, made a contract with the indorsee to satisfy the bills, and this agreement was executed on the part of the drawer while the bills were out of the hands of the indorsee, who had transferred them to the appellants, as security for his indebtedness to them; subsequently, the indorsee obtained the title to the bills. *Held*, that as soon as he did so they were extinguished by force of the satisfaction previously given and received. *Farmers' Bank of Virginia v. Groves*, 12 H. 51....25.

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1. The admiralty jurisdiction granted to the district courts of the United States under the constitution, extends to the navigable lakes and rivers of the United States, without regard to the ebb and flow of the tides of the ocean. *Propeller Genesee Chief v. Fitzhugh*, 12 H. 443....233.

2. Congress had power to pass the act of February 26, 1845, (5 Stats. at Large, 726,) not as regulations of commerce, but under the provision of the constitution that the judicial power of the United States shall extend to cases of admiralty and maritime jurisdiction, and as regulations of that jurisdiction. *Ib.*
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Leave to amend was properly refused by the circuit court, at the hearing, as the proposed amendment would have presented a new case. *Snead v. M' Coull*, 12 H. 407....208.

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1. An appeal does not lie to this court from a decree of a district court in bankruptcy. *Crawford v. Points*, 13 H. 11....856.
2. Where separate libels were filed by shippers of goods, and consolidated by order of court; and also where several shippers joined originally in one libel; the object of each being to recover a several compensation for injury done to his goods, from some causes for which the carrier was responsible. *Held*, That to test the right to appeal, each cause of damage must be considered separately; and if the damage awarded to a particular shipper, did not exceed \$2,000, there could be no appeal as to his cause. *Rich v. Lambert*, 12 H. 347....171.
3. The act of March 3, 1803, § 2, (2 Stats. at Large, 244,) prohibits this court from receiving new evidence on an appeal in an equity cause. *Russell v. Southard*, 12 H. 189....66.
4. An appeal-bond, conditioned that the obligees will pay all costs and damages which they may be adjudged to pay by reason of the appeal being broken, and the question of the extent of their liability submitted to the court on an agreed case, *held*, 1. That the proceeds of property attached in the suit were not to be applied *pro rata* to the original judgment and to the enhanced damages and costs by reason of the appeal, but that the former should be first fully paid. 2. That the equitable power of the court to reduce the penalty does not exist in a case submitted on an agreed statement of facts. 3. That as the whole amount of the penalty of the bond and interest thereon from the date of the writ in this suit, did not exceed what remained

due to the obligor, after applying the proceeds of the property attached as above mentioned, the obligees were liable to a judgment for such penalty and interest. *Ives v. Merchants Bank of Boston*, 12 H. 159 . . . 80.

COURTS OF THE UNITED STATES, 5. 14. 18. 19; DEPOSITION; SUPERSEDEAS.

ARBITRATION.

1. On an arbitration between partners, held that they had appropriated a part of the assets of the firm, and that the arbitrator had not power to disturb that arrangement. *McCormick v. Gray*, 13 H. 26 . . . 368.
2. Though one part of an award may sometimes be good and another part bad, the part allowed to stand must appear to be in no way affected by the departure of the referee from the submission. *Ib.*

ARKANSAS.

EVIDENCE, 9; LIMITATIONS OF SUITS, 2.

ARMY OF THE UNITED STATES.

1. The plaintiff, in the train of one of the military expeditions from the United States, entered Mexico during the war with that country, for purposes of trade; after entering that country, his wagons and teams were taken possession of by the defendant, the second in command, under an order from the commanding officer of the expedition, and, in consequence, his goods were lost, and his teams and wagons destroyed. *Held*, 1. That as he entered the country to trade with the enemy by the permission of the commander, and under the sanction of the executive power of the United States, his property was not liable to seizure by law for such trading. *Mitchell v. Harmony*, 13 H. 115 . . . 420.
2. That mere rumors or suspicions of a design to quit the forces and join himself to the enemy, would not justify the seizure; the defendant must prove the fact that such illegal design existed. *Ib.*
3. That to justify the seizure, in order to prevent the property from falling into the hands of the enemy, or to appropriate it to the public defence, the danger must be immediate and instantly impending; and though the state of facts, as they appeared to the commander when he acted, must govern, and he is justified in acting on reasonable grounds of belief; yet, mere good intentions on his part, and a general desire to promote the public service, are not sufficient; his judgment must have been fairly exercised upon the case of necessity shown by the evidence before him, to take private property for the use of the expedition, or to prevent the enemy from using it. *Ib.*
4. After the plaintiff's property had been seized and taken out of his control, and carried to a distant place, whither he necessarily followed, his efforts to save it from loss, and offers to restore the possession to him, did not divest his right of action, or impose on him any duty of taking possession. *Ib.*
5. A military officer cannot rely on an apparently unlawful order of his superior, as a justification. *Ib.*
6. Interest, at the rate of six per cent., from the time the judgment was signed in the circuit court, was allowed in this court as the proper measure of damages on the writ of error. *Ib.*

COURTS OF THE UNITED STATES, 1-5.

ASSIGNMENT.

1. Question, whether a writing was intended as a naked authority to collect and con-

trol certain judgments, or as an assignment of the creditors' interest therein. *Held*, to be the former only. *Rogers v. Lindsey*, 18 H. 441....577.

LIEN, 8; MORTGAGE, 10.

ASSUMPSIT.

MORTGAGE, 8.

ATTACHMENT.

APPEAL, 4.

BAIL.

1. The judgment against the debtor is conclusive evidence of the existence and amount of the debt in a *scire facias* against the bail. *Morsell v. Hall*, 18 H. 212....464.
2. A motion to enter an *exoneretur* is not a defence to the *scire facias*, but an appeal to the discretion of the court for a summary exercise of its equitable power; and the refusal of the motion cannot be assigned for error. *Ib.*

BAILMENT.

MORTGAGE, 10.

BANK.

BILL OF CREDIT.

BANKRUPT.

1. Where, by the local law, a judgment or execution makes a lien on property, a power of attorney given by the debtor to confess judgment, is a security made or given by the debtor, under the second section of the bankrupt act, (5 Stats. at Large, 442,) and is void, if accompanied by the facts which, according to that act, avoid securities, made or given by the debtor. *Buckingham v. McLean*, 18 H. 150....440.
2. But it is not sufficient to avoid it that the debtor should have contemplated a state of insolvency; he must have contemplated an act of bankruptcy, or an application by himself to be declared a bankrupt, at the time when he gave the power of attorney. *Ib.*
3. The giving of such a power of attorney is not, *per se*, an act of bankruptcy, unless done willingly, or fraudulently; and it is not fraudulent, if the donee be a *bona fide* creditor, unless the debtor contemplated bankruptcy in the sense above explained. *Ib.*

APPEAL. 1; MORTGAGE, 8.

BASTARD.

EVIDENCE, 10.

BILL OF CREDIT.

Bills of a bank, incorporated by a State, managed by directors under its charter, having a capital stock actually paid in and liable for its debts, and subject to be sued for non-payment, are not "bills of credit" issued by the State, though the State owns the entire stock, the legislature elects the directors, the faith of the State is pledged for the redemption of the bills, and they are made receivable in payment of all public dues. *Darrington v. State Bank of Alabama*, 18 H. 12....357.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The following paper:—

"No. 959. Mississippi Union Bank, Jackson, (Miss.,) February 8, 1840.

I hereby certify that Hugh Short has deposited in this bank, payable twelve months from 1st May, 1839, with five per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order, upon the return of this certificate. \$1,500. Wm. P. Grayson, Cashier," — not being paid at maturity and due demand made by notice to an indorser having been given, *held* that it was negotiable and the indorser liable. *Miller v. Austen*, 18 H. 218....467.

2. In an action to recover the consideration of a sale and conveyance of real and personal property, for which three notes were given, two of which were admitted to have been paid, and the third was produced and tendered to be given up; *Held*, 1. That the other notes need not be produced; 2. That, as defendants gave their notes for the purchase-money, the presumption was that the conveyances had been made, and the deeds need not be produced; 3. That there was no presumption that the notes were received in satisfaction of the purchase-money. *Lyman v. Bank of the United States*, 12 H. 225....115.

ACCORD AND SATISFACTION; LIMITATIONS OF SUITS, 4. 5; PLEADING, 4. 5; SLAVES; WITNESS.

BILL OF LADING.

SHIPS, &c. 1. 2. 5.

BOND.

An injunction bond in Louisiana was conditioned to pay "all such damages as the obligee may recover against us," this being the usual form under the state practice, where if the injunction is dissolved, the court proceeds to assess the damages and decrees their payment by the principal and sureties in such a bond. *Held*, 1. That state practice was inapplicable to a case in equity. 2. That no decree could be made against the sureties. 3. That as none had been made, the condition of the bond was not broken, and no action at law would lie thereon. *Bein v. Heath*, 12 H. 168....86.

APPEAL, 4; DAMAGES, 3. 4; EVIDENCE, 7. 8; MISTAKE; SUPERSEDEAS.

BOUNDARY.

Construction of an act of commissioners establishing part of the western boundary of Georgia on the west bank of the Chattahoochee River. *Howard v. Ingersoll*, 18 H. 381....542.

BURDEN OF PROOF.

SHIPS, &c. 5.

CAPTURE.

PRIZE.

CASES AFFIRMED.

1. *Gill v. Oliver's Executors*, 11 How. 529, affirmed, and the decision applied to this case. *Williams v. Oliver*, 12 H. 111....55. 12 H. 125....61.
2. The decision, in *Union Bank of Louisiana v. Stafford*, 12 H. 327, affirmed and applied to this case. *New Orleans Canal and Banking Company v. Stafford*, 12 H. 343....168.

3. Pollard v. Hagan, 3 How. 212, and Goodtitle v. Kibbe, 9 How. 477, affirmed and applied to this case. *Doe v. Beebe*, 13 H. 25....367.
4. The decision in this case, 9 How. 196, affirmed and explained. *Neves v. Scott*, 13 H. 268....492.

LIMITATIONS OF SUITS, 5; PUBLIC LANDS, 8. 9. 22.

CERTIFICATE OF DEPOSIT.

BILLS OF EXCHANGE, &c. 1.

CHARTER.

CONSTITUTIONAL LAW, 4.

COLLATERAL SECURITY.

MORTGAGE, 10.

COLLISION.

1. If a steamer is wrongfully in dangerous proximity to a flatboat, and the proximate cause of a collision is an unexpected sheer given to the flatboat by an eddy, the steamer is in fault, and must bear the whole loss. *Fretz v. Bull*, 12 H. 466....249.
2. If a steamer be wrongfully in a dangerous proximity to a sailing vessel, and there is immediate and pressing danger of a collision, and the master of the sailing vessel, previously in no fault, in the alarm of the moment, fails to give the most proper order, this does not exempt the steamer from damages for the collision which ensues. *Propeller Genesee Chief v. Fitzhugh*, 12 H. 443....233.
3. If a collision occurs in the night between a steamer and a sailing vessel, and the steamer had not a proper look-out kept, this is *prima facie* evidence that the fault of the steamer occasioned the collision. *Ib.*
4. What is a proper look-out, explained. *Ib.*
5. If a steamboat, injured by a collision on the Ohio, observed the customary rule, which requires a descending boat to keep the middle of the stream and stop her engines when meeting an ascending boat, she is not in fault for not backing, when it was uncertain whether the ascending boat would pass ahead or astern. *Williamson v. Barrett*, 13 H. 101....411.
6. Damages for demurrage may be given in a collision case, and the rate of freight which a vessel would have earned, deducting expenses, is a proper measure. *Ib.*
7. A case of collision on the Mississippi River, turning wholly on a question of fact. *Walsh v. Rogers*, 13 H. 283....498.

ADMIRALTY, 3. 4.

COMMERCE.

CONSTITUTIONAL LAW, 1-3; NUISANCE.

COMMON CARRIER.

SHIPS, &c.

COMPACT BETWEEN STATES.

NUISANCE.

CONGRESS.

STATUTES.

CONSTITUTIONAL LAW.

1. Laws for the regulation of pilots and pilotage, are not laws laying imposts, or duties

on imports, or exports, or tonnage, within the meaning of the tenth section of the first article of the constitution of the United States, if they do not pass the appropriate line which limits laws for the regulation of the pilots and pilotage; and they cannot be considered as passing that line because they require the payment of half pilotage fees by certain vessels, which decline to receive a pilot, and not by others, nor because the sums thus received go to form a charitable fund for distressed or decayed pilots, their widows and children. *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 H. 299....143.

2. A regulation of pilots and pilotage is a regulation of commerce, within the grant to congress of the commercial power, contained in the eighth section of the first article of the constitution. *Ib.*
3. The mere grant to congress of the power to regulate commerce, did not prevent the States from regulating pilots; and the legislation of congress, with a single exception, is such, that state regulations may be made, without conflicting with the will of congress in making regulations, or in leaving individuals to their own unrestricted action. *Ib.*
4. Under a stipulation in the charter of a railroad corporation, that the State would not, within thirty years, allow any other railroad to be constructed, within certain limits, the probable effect of which would be to diminish the number of a certain description of passengers on the railroad then chartered. *Held*, 1. That this stipulation was to be construed strictly, as against the corporation. 2. That it was not violated merely by chartering another railroad, which might be used, exclusively, to transport merchandise. *Richmond, Fredericksburg, and Potomac Railroad Company v. Louisa Railroad Company*, 18 H. 71....392.

ADMIRALTY, 1-8; BILL OF CREDIT; COURTS OF THE UNITED STATES, 2-5;
CUMBERLAND ROAD; PUBLIC LANDS, 21. 22.

CONTINUANCE.

WRIT OF ERROR, 4.

CONTRACT.

1. Under a power reserved to a party to declare a contract no longer binding, *held*, this extended only to the work which remained to be done, and did not deprive the contractor of compensation for what had been done. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 18 H. 307....512.
2. Certain special covenants and stipulations in an indenture between a railroad corporation and a contractor for building the road, construed and applied. *Ib.*
3. A contract to exchange securities, followed by an actual exchange, cannot be rescinded by one party without a tender of what he received. *Farmers' Bank of Virginia v. Groves*, 12 H. 51....25.

ASSIGNMENT; CONSTITUTIONAL LAW, 4; CUMBERLAND ROAD; DAMAGES, 1;
EQUITY; MISTAKE; MORTGAGE, 9; NUISANCE; SLAVES; SPECIFIC PERFORMANCE.

CORPORATION.

CONSTITUTIONAL LAW, 4; EVIDENCE, 3. 4.

COUNSEL FEES.

DAMAGES, 2.

COURTS.

PRIZE, 1.

COURTS OF THE UNITED STATES.

1. The courts of the United States have jurisdiction between proper parties, of an action of trespass, *de bonis asportatis*, committed in a foreign country. *Müchell v. Harmony*, 13 H. 115....420.
2. The power proposed to be conferred on the circuit courts of the United States by the act of March 23, 1792, (1 *Stats. at Large*, 243,) was not judicial power within the meaning of the constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts. *United States v. Todd*, in note to *United States v. Ferreira*, 13 H. 40....373, 380.
3. As the act of congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court in the character of commissioners. *Ib.*
4. Money paid under a certificate from persons not authorized by law to give it, might be recovered back by the United States. *Ib.*
5. An act of congress having authorized the district judge of the United States for Florida, to adjudicate on claims for injuries suffered by inhabitants of Florida, by the operations of the American army in Florida, which claims were to be paid, if the secretary of the treasury should, on a report of the evidence, deem it equitable; *Held*, not to be an authority to exercise any of the judicial power of the United States under the constitution; but that the judge acted as a commissioner, and no appeal lay to this court. *United States v. Ferreira*, 13 H. 40....373.
6. If the judgment of an inferior court of a State, against a title claimed under an act of congress, is affirmed by a divided court above, a writ of error lies, under the 25th section of the judiciary act of 1789, (1 *Stats. at Large*, 85.) *Lessieur v. Price*, 12 H. 59....81.
7. If the highest court of a State in fact decides against the plaintiff, one of the questions enumerated in the 25th section of the judiciary act of 1789, (1 *Stats. at Large*, 85,) a writ of error lies, although it may have disregarded one of its own rules of practice in making a decision. *Darrington v. State Bank of Alabama*, 13 H. 12....357.
8. Under the 25th section of the judiciary act of 1789, (1 *Stats. at Large*, 85,) this court cannot reëxamine the decision of a state court, that a law of a territory was not repugnant to the constitution of the United States. *Miners' Bank of Dubuque v. Iowa*, 12 H. 1....1.
9. In Louisiana, the opinion of the court is entered of record, and shows on what principles the case was decided, and if it does not appear from the opinion, or otherwise on the record, that some question described in the 25th section of the judiciary act of 1789, (1 *Stats. at Large*, 85,) was decided against the plaintiff in error, this court has not jurisdiction of a writ of error to the state court. *Grand Gulf Railroad and Banking Company v. Marshall*, 12 H. 165....83.
10. A decision by a state court, in favor of a right claimed under an act of congress, does not entitle the losing party to a writ of error. *Linton v. Stanton*, 12 H. 423....222.
11. If it clearly appear that the decision of the state court would have been the same, independent of a law of the State which the plaintiff in error insisted impaired the obligation of a contract, this court will not reverse the decision on that ground, and send the case back to be again decided the same way upon the other ground. *Williams v. Oliver*, 12 H. 111....55. 12 H. 125....61.
12. If the record does not show that the state court in fact decided the case upon a question of local law, this court will not infer that it was decided on such a point, if such decision would be erroneous. *Neilson v. Lagow*, 12 H. 98....46.
13. This court is not bound by the decision of a state court, upon a question of equity law. *Neves v. Scott*, 13 H. 268....492.

14. The act of March 3, 1845, (5 Stats. at Large, 732,) is a revenue law, within the meaning of the act of May 31, 1844, (5 Stats. at Large, 658,) as to writs of error and appeals. *United States v. Bromley*, 12 H. 88....43.
 15. The practice of the circuit court of the United States for Louisiana, as to giving reasons for a judgment and as to the form and effect of verdicts, is governed by the acts of congress and the rules of the common law, and not by the laws of the State. *Parks v. Turner*, 12 H. 89....18.
 16. The 34th section of the judiciary act of 1789, (1 Stats. at Large, 92,) applies only to the trial of civil actions at the common law. *United States v. Reid*, 12 H. 361....180.
 17. In criminal trials in the courts of the United States held in one of the original thirteen States, the admissibility of evidence depends upon the law of the State where the trial is held, as it was, when the courts of the United States were established by the judiciary act of 1789. *Ib.*
 18. If an appellee has appeared, without a citation, and allowed the first term to pass over, and has made no motion to dismiss, it is too late to move at the second term. *Buckingham v. McLean*, 18 H. 150....440.
 19. A cause cannot be docketed and dismissed under the 43d rule of this court upon a certificate of the clerk of the court below, which does not name every individual who was a party to the record. *Smith v. Clark*, 12 H. 21....18.
- ADMIRALTY, 1-3; AMENDMENT; APPEAL; DEPOSITION; PARTIES; PRIZE, 1. 4-6; PUBLIC LANDS, 14-23; SUPERSEDEAS; VERDICT; WRIT OF ERROR.

COVENANT.

1. Though two persons are named in an indenture, as "the party of the first part," if only one seals the deed, he alone is that party, and may sue alone on covenants with "the party of the first part." *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 13 H. 307....512.
2. Rules as to construing covenants to be dependent or otherwise. *Ib.*

CONTRACT, 2.

CRIMINAL LAW.

COURTS OF THE UNITED STATES, 17.

CUMBERLAND ROAD.

Under the compact between the United States and the State of Maryland, respecting the Cumberland road, the imposition of a toll of four cents for every passenger carried in a mail-coach is, in effect, the imposition of a tax upon the United States, through the contractors for carrying the mail; and the other requirement, to pay the sum of one dollar for every mail-coach passing a gate, whereof the proprietor does not report the number of passengers, is but a commutation for such tolls; and the law is a violation of that compact, and void. *Achison v. Huddleson*, 12 H. 293....140.

DAMAGES.

1. In an action for breach of a contract to permit the plaintiff to construct a railroad and to pay him therefor, at certain rates, the profits, meaning thereby the difference between the cost to him of doing the work, and the price to be paid for it, are a proper subject of damages. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 13 H. 307....512.
2. In an action of trespass, a jury may give what are called exemplary damages; but counsel fees are not to be included in, and allowed as part of the damages, in any action at law. *Day v. Woodworth*, 13 H. 368....534.

3. Where an execution was levied on slaves, and a delivery bond given, in Mississippi, and on its forfeiture, which operated as a judgment against the principal and surety, the surety took the slaves by force out of the possession of the principal and subjected them to sale on the execution, and thus satisfied the judgment, in an action of trespass by the principal against the surety, *held*, that the latter might recoup from the damages the amount of the judgment so satisfied. *McAfee v. Crofford*, 13 H. 447 . . . 583.
4. The jury having found that, in consequence of the wrongful abduction of the plaintiffs' slaves, the cattle of the neighbors destroyed his corn, and a flood in the river swept away a quantity of his wood, *held*, that it was not erroneous to include the value of these things in the damages, in an action of trespass for carrying away the slaves. *Ib.*

COLLISION, 6; WRIT OF ERROR, 4.

DEATH.

EXECUTION.

DECEIT.

The gist of an action for a false representation concerning the credit of another, is the fraud of the defendant, and damage thereby done to the plaintiff; and for any honest statement, however ill-founded, this action will not lie. *Lord v. Goddard*, 13 H. 198 . . . 461.

DEED.

1. A conveyance to trustees, in trust to sell the land, and apply so much of the proceeds as may be needful to pay a debt, is not a purchase of the land by the creditor. *Neilson v. Lagow*, 12 H. 98 . . . 46.
2. Though a deed contain language which would be sufficient to raise a use, executed, yet if it appear that the legal title was to continue in trustees, such language will be held only to declare a trust. *Ib.*
3. If land be conveyed to trustees, in trust to sell and convey a fee-simple, they take a fee, without words of limitation. *Ib.*
4. The law of Alabama does not require the acknowledgment of a *feme covert* to be made in *ipsissimis verbis*; if it conform in substance to what the statute requires, it is valid. *Dundas v. Huchcock*, 12 H. 256 . . . 123.
5. If a widow, who is also a devisee with a power of sale, release to a purchaser for a valuable consideration, she shall be deemed to convey in every character which enabled her to give effect to her deed; and she cannot set up that she conveyed only under a power; that she disaffirmed the provision for herself in the will, and took her dower, and did not release that. *Ib.*
6. The impression of a seal upon paper, sufficiently clear to be recognized, is a valid legal seal. *Pillow v. Roberts*, 13 H. 472 . . . 597.

COVENANT; DOWER; EVIDENCE, 3. 4. 9; FRAUD; LIMITATIONS OF SUITS, 1. 2
TRUST.

DEMURRAGE.

COLLISION, 6.

DEMURRER.

EQUITY, 1; PLEADING, 1. 2.

DEPOSITION.

Where the circuit court issued a commission to take evidence in an admiralty cause

pending in this court by appeal, and both parties joined in executing it, a proper order of the circuit court, or consent of the parties to dispense with the order, must be presumed. *Rich v. Lambert*, 12 H. 347....171.

EVIDENCE, 5. 16.

DISCONTINUANCE.

PLEADING, 4. 5.

DISMISSAL OF SUIT.

COURTS OF THE UNITED STATES, 18. 19.

DOWER.

A clause releasing the right to dower was inserted in an indenture after the signatures, of both husband and wife, and began: "And I, A. H., wife of H. H., &c." *Held*, That it was a part of the same deed, and was a valid release under the laws of Alabama. *Dundas v. Hitchcock*, 12 H. 256....123.

DEED, 5.

EJECTMENT.

PUBLIC LANDS, 5.

EQUITY.

1. A bill in equity, which states as the complainant's title, that he purchased, under regular proceedings, and at an open and fair execution sale, a debt of \$260,000, for \$600, is not bad on demurrer. *Erwin v. Parham*, 12 H. 197....97.
2. A creditor who has made a binding agreement with his debtor, not inequitable in itself, to accept specific articles in payment of his debt, cannot have relief in equity, without complying with his contract. *Very v. Levy*, 18 H. 345....527.
3. Such an agreement imports, *per se*, a valuable consideration. *Ib.*

APPEAL, 3; BOND; COURTS OF THE UNITED STATES, 13; FRAUD; LIEN, 1; MISTAKE; MORTGAGE, 8-10; NUISANCE; PARTIES; SPECIFIC PERFORMANCE; SUPERSEDEAS.

ESCROW.

EVIDENCE, 4.

ESTOPPEL.

If, in an action of *assumpsit* against a corporation, the defendant insist that the writing, on which the action is founded, bears the corporate seal, and defeats the action upon the ground that it should have been an action of covenant, the defendant is estopped from denying, on the trial of an action of covenant, that the paper is the deed of the corporation. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*. 18 H. 307....512.

DEED, 5; EVIDENCE, 6; LIEN, 1; MORTGAGE, 9.

EVIDENCE.

1. Where a formal record is not required by law to be made up, those entries which are permitted to stand in its place, are admissible in evidence. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 18 H. 307....512.
2. The docket entry of an action is admissible evidence of its mere pendency in court. *Ib.*

3. Evidence that a corporation, through its counsel, treated a paper as its deed, in the course of a trial, is admissible, as against the corporation, to prove that the seal, attached to the paper, is the seal of the corporation. *Ib.*
 4. Though it may be shown that at the time of the sealing of an indenture it was agreed, that the instrument should not be the deed of a corporation until a condition should be complied with, such an understanding prior to the sealing, and in no way connected with that act, cannot be shown. *Ib.*
 5. To read the deposition of a deceased witness, taken in a former cause, it is not necessary the parties should be identical. *Ib.*
 6. If a party have not opportunity to show an estoppel by pleading, he may exhibit the matter thereof in evidence, and the court and jury are bound thereby. *Ib.*
 7. A copy of an official bond, duly authenticated according to the act of congress of July 2, 1836, § 15, (5 Stats. at Large, 82,) is admissible in evidence. *United States v. Wilkinson*, 12 H. 246...118.
 8. Under the 8th and 15th sections of the act of July 2, 1836, (5 Stats. at Large, 81, 82,) transcripts of the quarterly returns of a postmaster, as corrected by the auditor, and of the accounts based thereon, are admissible in evidence in an action against the postmaster and his sureties on his official bond, though credits claimed by him and rejected, do not appear in such accounts. *United States v. Hodge*, 13 H. 478...603.
 9. Under the law of Arkansas, a deed, made by a collector of taxes, and acknowledged and recorded, is evidence of the validity of the collector's proceedings. *Pillow v. Roberts*, 13 H. 472...597.
 10. Bill in equity to establish the title of Myra Clark Gaines to one half the estate of the late Daniel Clark, as his legitimate daughter, and to have an account thereof from his executors and others. *Held*, that the legitimacy of the complainant was not made out, and the bill was dismissed. *Gaines v. Relf*, 12 H. 472...254.
 11. The marriage of the complainant's mother to D. being admitted, his confession that he had a lawful wife living at the time of such marriage, is not admissible in evidence as against third persons. *Ib.*
 12. The certificate of a clergyman, made sixteen years after the alleged act, that he had married the persons named therein, held not to be evidence. *Ib.*
 13. A record of a county court in New Orleans, containing no libel, or petition, and not showing upon its face that it was a proceeding *in rem*, held inadmissible in evidence as against third persons. *Ib.*
 14. A decree of this court, made in a suit which is proved not to have been a real controversy, is not admissible in evidence against third persons. *Ib.*
 15. Where the complainant had put in secondary evidence that one D. had been convicted of bigamy by the ecclesiastical court in New Orleans, while under the dominion of Spain, and that, on search, the record thereof could not be found, the respondent may introduce a record of such prosecution in which D. was acquitted, coming from the custody of the proper officers, the signatures of the Spanish officers to the authentication of the record being proved, and it being shown that at the time in question those persons held those offices. *Ib.*
 16. A deposition of the complainant's mother, under whom she claims title, made in another proceeding, is evidence against the complainant. *Ib.*
 17. A letter from a husband to a wife, is evidence in a suit *inter alios* of the state of his feelings towards her when written, and also of his being at the place where it purports to have been written at the time of its date. *Ib.*
- APPEAL, 3; BAIL, 1; BILLS OF EXCHANGE, &c. 2; COLLISION, 3; COURTS OF THE UNITED STATES, 16. 17; DEPOSITION; LIMITATIONS OF SUITS, 1; MORTGAGE, 1-3; NAVY, &c. 5; NEW TRIAL; PUBLIC LANDS, 11; SHIPS, &c. 5; WRIT OF ERROR, 2.

EXCEPTIONS.

1. An exception which became wholly immaterial in the progress of the trial, cannot be assigned as error. *Philadelphia, Wilmington, and Baltimore Railroad Company v. Howard*, 18 H. 307....512.
2. The right to open and close is so far dependent on the discretion of the court below, that it is not the subject of a bill of exceptions. *Day v. Woodworth*, 18 H. 363....534.
3. If a record declare that a bill of exceptions was taken on the trial of a case, this will control an erroneous date attached to the bill of exceptions, according to which it was signed before the trial. *United States v. Wilkinson*, 12 H. 246....118.

WRIT OF ERROR, 2-4.

EXECUTION.

Where a judgment lien existed on land at the time of its seizure and sale on the execution, and, under the law of Mississippi, an appraisal and suspension of proceedings took place, and the debtor died before the issue of a *venditioni exponas*, under which the land was sold to satisfy the execution. *Held*, 1. That the appraisal, &c., did not displace the lien. 2. That the sale upon the *venditioni exponas* was merely a continuation of the proceedings under the execution begun in his lifetime. 3. That his death, after the teste of the execution, and the seizure of the land thereon, did not render a *scire facias* necessary, and the levy and sale were regular and legal. *Taylor v. Doe*, 18 H. 287....502.

DAMAGES, 3. 4; JUDGMENT, &c.; LIEN, 2; SUPERSEDEAS.

EXECUTORS AND ADMINISTRATORS.

LIMITATIONS OF SUITS, 3. 5.

EXONERETUR.

BAIL, 2.

FLORIDA.

COURTS OF THE UNITED STATES, 5.

FRANCE.

PUBLIC LANDS, 6. 16. 17. 19.

FRAUD.

A conveyance of land set aside, for fraudulent misrepresentations as to the quantity value, and title. *Tyler v. Black*, 18 H. 280....469.

DECEIT; MORTGAGE, 4.

FRAUDULENT CONVEYANCE.

1. To avoid a post-nuptial settlement, insolvency need not be proved. *Parish v. Murphree*, 18 H. 92....407.
2. A merchant, largely indebted, and whose means of payment were subject to many contingencies, was not in a condition to make such a settlement of a large landed estate, and it is voidable by his creditors. *Id.*

BANKRUPT.

FREIGHT.

COLLISION, 6.

FUGITIVES FROM SERVICE, &c.

The 4th section of the act of February 12, 1793, (1 Stats. at Large, 805,) respecting

fugitives from service, is repealed, so far as it relates to the penalty, by the act of September 18, 1850, (9 Stats. at Large, 462,) and an action for the penalty, pending at the time of the repeal, is barred. *Norris v. Crocker*, 18 H. 429....575.

GEORGIA.

BOUNDARY.

GRANT.

PUBLIC LANDS.

GREAT BRITAIN.

PUBLIC LANDS, 28.

HUSBAND AND WIFE.

Under the charter of the Union Bank of Louisiana, it was held, that a married woman could and did bind her property by a contract of borrowing jointly with her husband, whatever might be the general law of Louisiana on the subject. *Union Bank of Louisiana v. Stafford*, 12 H. 827....160. *New Orleans Canal and Banking Company v. Stafford*, 12 H. 848....168.

DEED, 4; DOWER; EVIDENCE, 11. 12. 17; FRAUDULENT CONVEYANCE.

INDIANA.

Certain special acts of the State of Indiana as to lands given for the establishment of a county seat, examined and applied. *Sargeant v. State Bank of Indiana*, 12 H. 371....190.

INDICTMENT.

COURTS OF THE UNITED STATES, 17.

INJUNCTION.

BOND; MISTAKE; NUISANCE.

INSOLVENT.

LIEN, 8.

INSURANCE.

ADMIRALTY, 4; MORTGAGE, 6.

INTEREST.

ARMY, &c, 6.

INTERNATIONAL LAW.

PRIZE.

JEOFAILS, STATUTES OF.

PLEADING, 2; VERDICT.

JOINDER OF PARTIES.

APPEAL, 2; PARTIES; PLEADING, 4. 5.

JOINT DEFENDANTS.

PARTIES; PLEADING, 4. 5.

JUDGMENT AND DECREE.

Under the law of Louisiana, the sale of property under execution, on a twelve months' credit, neither satisfies the judgment, nor novates the debt. *Union Bank of Louisiana v. Stafford*, 12 H. 827....160. *New Orleans Canal and Banking Company v. Stafford*, 12 H. 843....168.

ASSIGNMENT; BAIL, 1; BANKRUPT; COURTS OF THE UNITED STATES, 15; EVIDENCE, 14; EXECUTION; LIEN, 2. 3; LIMITATIONS OF SUITS, 3. 5; MORTGAGE, 8; PARTIES; PLEADING, 2-5; PUBLIC LANDS, 14. 24; VERDICT.

JURISDICTION.

COURTS OF THE UNITED STATES, 1; PARTIES.

JURY.

NEW TRIAL.

KENTUCKY.

NUISANCE.

LACHES.

MORTGAGE, 5.

LAPSE OF TIME.

PUBLIC LANDS, 13.

LIEN.

1. A settler, entitled to preëmption, sold his right, his vendee resold it, taking from the second vendee a contract in writing, to pay to the preëmptioner a sum of money as part of the price for which the preëmptioner had conveyed his right to the first vendee. Upon a bill in equity by the preëmptioner, to subject the land to the payment of this sum of money, *held*, 1. That the preëmptioner had a title, which was the subject of a sale. 2. That the second vendee having gone into possession under his contract, which he never rescinded, and not having relinquished the possession, could not afterwards acquire a title from the government by proving a right of preëmption in his own name, and then insist that nothing was due on account of his purchase. 3. That the complainant had a lien on the land by virtue of the contract of the second with the first vendee. *Thredgill v. Pintard*, 12 H. 24....15.
2. The levy of a *ca. sa.*, in 1817, was a release of the judgment lien on lands of the debtor, by the law of Virginia; and in this case there was no escape, or death in custody, to revive the lien, nor was any execution lien created by the 10th section of the Virginia act of 1819, which applies only to levies commenced after the date of the act. *Snead v. McCull*, 12 H. 407....208.
3. Taking the poor debtor's oath, under the act of congress of January 6, 1800, (2 Stats. at Large, 4,) did not revive a judgment lien, nor did a deed of assignment of his property by the debtor to the marshal. *Id.*

BANKRUPT; EXECUTION.

LIMITATIONS OF SUITS.

1. An entry under a deed from a tax collector, and possession of the land described in the deed, is sufficient evidence of an adverse seisin under a statute of limitations. *Pillow v. Roberts*, 13 H. 472....597.

2. By the law of Arkansas, five years' possession under an invalid deed from a tax collector, is a bar to an action by the true owner. *Pillow v. Roberts*, 13 H. 472.... 597.
3. Though a judgment obtained against one executor in a State where he has qualified, is not conclusive against another executor in another State where he has qualified, it is *prima facie* valid; and a bar by the statute of limitations, of the original cause of action, is not a bar to a suit on such a judgment. *Hill v. Tucker*, 13 H. 458.... 587.
4. Article 3505, of the Code of Louisiana, does not apply to, or limit suits on paper not negotiable. *Ib.*
5. The preceding decision, *Hill v. Tucker*, 13 H. 458, applied to this case. *Goodall v. Tucker*, 13 H. 469.... 594.

MORTGAGE, 9; PUBLIC LANDS, 19.

LOUISIANA.

BOND; COURTS OF THE UNITED STATES, 9. 15; HUSBAND AND WIFE; JUDGMENT, &c.; LIMITATIONS OF SUITS, 4. 5; PUBLIC LANDS, 7-23; WRIT OF ERROR, 2. 3.

MARRIAGE.

EVIDENCE, 11. 12.

MISSISSIPPI.

EXECUTION; PLEADING, 4. 5; SLAVES.

MISSOURI.

PUBLIC LANDS, 1-4.

MISTAKE.

A having purchased land from B, suffered it to be sold for taxes; afterwards C, who was A's surety for the price, obtained from B a new bond to convey, the first being surrendered; B was ignorant of the tax sale, received no new consideration, and intended merely to substitute C for A. On a bill by C to have the contract rescinded, and the judgment against him for the purchase-money enjoined; *Held*, 1. That the loss of the title was C's loss. 2. That the bond to C should be reformed, so as to accord with the real agreement. 3. That this might be done under the answer without a cross-bill; and a decree was made accordingly. *Bradford v. Union Bank of Tennessee*, 13 H. 57.... 383.

MONEY HAD AND RECEIVED.

PLEADING, 4. 5.

MONITION.

PRIZE, 5.

MORTGAGE.

1. On a bill to redeem, parol evidence is admissible to show that what appears upon the written papers to have been a conditional sale for an agreed price, was in fact a loan of money, and that the land was but a security for the money lent. *Russell v. Southard*, 12 H. 189.... 66.
2. The inadequacy of the sum mentioned in the papers as the consideration of the alleged sale, is an important circumstance to show that the transaction was not in

- truth a sale, but a mortgage; and, in a doubtful case, courts will incline to consider it a mortgage. *Russell v. Southard*, 12 H. 139....66.
3. Though no personal security for the repayment of the money was given in writing, yet where the written memorandum ascertains the amount advanced, and the oral evidence shows it was by way of loan, the relation of debtor and creditor exists and *assumpsit* will lie, and the conveyance is a mortgage. *Ib.*
 4. Though a mortgagee in possession may take a release from the mortgagor, the transaction is to be carefully scrutinized, and if any unconscientious advantage was taken, the release will be set aside. *Ib.*
 5. An account of rents and profits is not an inseparable incident to the redemption of a mortgage of lands; laches by the mortgagor may, and in this case did, operate as a waiver of the right. *Ib.*
 6. A mortgagee in possession, who obtains insurance, and pays the premium, is not accountable to the mortgagor for what was received under the policy. *Ib.*
 7. A mortgagee, in possession of slaves, is accountable, not only for their hire actually received by him, but for what he might have received without gross negligence. *Bennett v. Butterworth*, 12 H. 367....186.
 8. Where the district court, sitting in bankruptcy, reformed a first mortgage without notice to the second mortgagee, and subsequently, on the petition of the assignee, and with notice to the second mortgagee, caused the mortgaged property to be sold, *held*, that the second mortgagee was bound by this last proceeding, and could not maintain a bill against the first mortgagee, who was the purchaser under the sale, to charge his second mortgage on the property. *Fowler v. Hart*, 18 H. 373....538.
 9. The Texas statute of limitations of actions upon contracts, or for the detention of personal property, have no application to a bill in equity to foreclose a mortgage; equity does not allow the mortgagor to set up his possession as adverse to the mortgagee. *Union Bank of Louisiana v. Stafford*, 12 H. 327....160. *New Orleans Canal and Banking Company v. Stafford*, 12 H. 343....168.
 10. A bill to foreclose an equitable mortgage on machinery, cannot be maintained by an assignee, who took the assignment only to secure a debt which has been paid. *Wilbur v. Almy*, 12 H. 180....89.

NAVIGATION.

NUISANCE.

NAVY OF THE UNITED STATES.

1. In an action by a marine against his commanding officer, for inflicting punishment on him for refusing to do duty in a foreign port, upon the ground that the time of his enlistment had expired and he was entitled to his discharge, *held*, 1. That the right to determine the question whether the plaintiff was then and there entitled to his discharge, was for the time being, in the commander; and it was the duty of the plaintiff to submit to that determination and look for redress on his return home; and for any mere error in judgment in this matter, no action would lie against the commander. *Dinsman v. Wilkes*, 12 H. 390....201.
2. That the refusal of the plaintiff to submit to the decision of the commander, was an act of insubordination, for which he was liable to punishment. *Ib.*
3. That if the defendant, in the honest exercise of his judgment, believed it proper to confine the plaintiff on shore, he had a right to do so. *Ib.*
4. If the punishment inflicted on the plaintiff, was, in any degree, or in any manner, aggravated by malice, or a vindictive feeling, or a desire to oppress him, on the part of the defendant, he is liable to an action. *Ib.*

5. Certain questions as to the admissibility of evidence in the particular posture of the facts, considered and ruled. *Dinsman v. Wilkes*, 12 H. 390....201.

PRIZE, 3.

NEW TRIAL.

Though no absolute rule is laid down, concerning the exclusion of the testimony of jurors as to misconduct in the jury-room, the court examined the evidence in this case, and held it did not show ground for a new trial. *United States v. Reid*, 12 H. 361....180.

NOTICE.

RECORD.

NOVATION.

JUDGMENT, &c.

NUISANCE.

1. The Ohio River being a public navigable stream, of right should remain free and unobstructed. *Pennsylvania v. Wheeling and Belmont Bridge Company*, 13 H. 518....621.
2. The Wheeling bridge is an obstruction of the free navigation of the Ohio by vessels propelled by steam. *Ib.*
3. A law of the State of Virginia authorizing this obstruction was inoperative. *Ib.*
4. 1. Because it impaired the obligation of the compact between Virginia and Kentucky, that the use and navigation of the Ohio, so far as the territory of Virginia or Kentucky is concerned, shall be free and common to the citizens of the United States. *Ib.*
5. 2. Because it is in conflict with the legislation of congress which regulates the commerce among different States and with foreign nations carried on upon this river. *Ib.*
6. The State of Pennsylvania, as the proprietor of public works, suffers special damage in its property, by reason of this public nuisance, and this damage is continued from day to day, is not capable of proof and computation in each item thereof, and so is not reparable by the course of the common law, and in such a case a bill in equity, by the State, lies, to enjoin the nuisance. *Ib.*
7. But, if by the construction and use of a suitable and practicable draw, the navigation of the river should be restored to such a condition as, in the judgment of the court, renders it free from unreasonable obstruction, the bridge should not be treated as a nuisance. *Ib.*

OFFICER.

ARMY, &c.

OHIO RIVER.

NUISANCE.

PARTIES.

When the proper parties are not within the jurisdiction, and a decree may be made without affecting their interests, the plaintiff is excused from joining them by the first section of the act of February 28, 1839, (5 Stats. at Large, 321.) *Union Bank of Louisiana v. Stafford*, 12 H. 327....160. *New Orleans Canal and Banking Company v. Stafford*, 12 H. 343....168.

ADMIRALTY, 4; COVENANT, 1; PUBLIC LANDS, 15.

PARTNERSHIP.

Partners have the right, as between themselves, to control the possession of their assets, and appropriate them to the payment of claims by one partner on the firm. *McCormick v. Gray*, 13 H. 26....368.

ARBITRATION.

PATENT.

PUBLIC LANDS, 5.

PAYMENT.

ACCORD AND SATISFACTION; BILLS OF EXCHANGE, &c. 2; JUDGMENT, &c.; MORTGAGE, 10; PARTNERSHIP.

PENALTY.

FUGITIVES FROM SERVICE.

PENNSYLVANIA.

NUISANCE.

PENSION.

COURTS OF THE UNITED STATES, 2-4.

PILOTS AND PILOTAGE.

CONSTITUTIONAL LAW, 1-3.

PLEADING.

1. The omission of the defendant to join in a demurrer to a plea, is a waiver of that plea. *Morsell v. Hall*, 13 H. 212....464.
2. An omission to enter a formal judgment on one of two pleas, which was demurred to, and which showed no defence, is cured by the statute of jeofails, (1 Stats. at Large, 91, § 32.) *Ib.*
3. Where a set of pleas are all applicable to the first count, which was struck out after the issues thereon were made up, and the second count was not answered, it was regular to give judgment for the plaintiff for want of a plea. *Hogan v. Ross*, 13 H. 173....451.
4. As, by the law of Mississippi, a joint promise on negotiable paper, makes a several, as well as a joint liability to action, the plaintiff, in an action against two or more jointly, may, by leave of the court, discontinue against all but one, and take judgment against him alone, though the defendants plead jointly. *Coffee v. Planters Bank of Tennessee*, 13 H. 183....454.
5. And where such a judgment was rendered on a count for money had and received, and no objection was taken in the court below, upon a writ of error, it was intended, in support of the judgment, that the liability of the defendant arose out of negotiable paper, and so was several as well as joint. *Ib.*

ADMIRALTY, 4; EVIDENCE, 6; MISTAKE; PARTIES; PUBLIC LANDS, 14. 18; WRIT OF ERROR, 1.

PLEDGE.

MORTGAGE, 10.

POOR DEBTOR.

LIEN, 8.

POST-OFFICE AND POSTMASTER.

1. A paper, folded in the form of a letter not sealed, containing an order for merchandise, is "mailable matter," within the meaning of the tenth section of the act of March 3, 1845, (5 *Stats. at Large*, 736,) and the carriage of such a letter subjects the master of a steamboat running regularly on a mail route, to a penalty. *United States v. Bromley*, 12 H. 88....43.
2. An initial letter written on the envelop of a newspaper, is not a "writing or memorandum" forbidden by the 18th or 30th section of the act of March 3, 1825, (4 *Stats. at Large*, 105, 111,) and a postmaster is not justified thereby in detaining such newspaper from the person to whom it is directed. *Teal v. Felton*, 12 H. 284.... 136.
3. Trover lies in a state court for the conversion, to which such unlawful detention amounts. *Ib.*

EVIDENCE, 7. 8.

POWER.

DEED, 5.

PRACTICE.

AMENDMENT; APPEAL, 3. 4; BOND; COURTS OF THE UNITED STATES, 15-19;
EXCEPTIONS, 2.

PRESIDENT.

PRIZE, 1.

PRESUMPTION.

BILLS OF EXCHANGE, &c. 2; DEPOSITION; PUBLIC LANDS, 7-10. 18.

PRIZE.

1. Neither the President, nor any inferior executive officer, can establish a court of prize, competent to take jurisdiction of a case of capture *jure belli*. *Jecker v. Montgomery*, 13 H. 498....615.
2. Though it is the duty of the captor, under the laws of nations affirmed by the act of congress, to send in captured property for adjudication by a court of his own country, having competent jurisdiction, yet he may be excused, by imperative circumstances, for making a sale of such property, and afterwards seasonably subjecting the proceeds to the jurisdiction of a proper court of prize. *Ib.*
3. The orders of the commander in chief, not to weaken his force by detaching an officer and crew for the prize; or his own deliberate and honest judgment, exercised in reference to all the circumstances, that the public service does not permit him to make such detachment, will excuse the captor from sending in his prize for adjudication. *Ib.*
4. If no sufficient excuse appear, or if the captor have unreasonably delayed to bring the question of prize or no prize to an adjudication, the court may refuse to proceed to an adjudication, and may award restitution, with or without damages, upon the ground of forfeiture of rights by the captor, although his seizure was originally lawful. *Ib.*

5. So if the captor should neglect to proceed at all, the court may, upon a libel filed by the owner, for a marine trespass, grant a monition to proceed to adjudication in a court of prize, or refuse it, and at once award damages. *Jecker v. Montgomery*, 13 H. 498....615.
6. In this case, the captor was held to have forfeited no rights, and an order to proceed in a court of prize, within whose jurisdiction were the proceeds of the sale of the property, was directed to be made by the circuit court. *Ib.*

PUBLIC LANDS.

1. The inception of title to a particular tract of land under a New Madrid certificate, is the recording of the plat and survey in the recorder's office. *Lessieur v. Price*, 12 H. 59....31.
2. By the act of March 3, 1820, (3 Stats. at Large, 547, § 6,) granting four sections of land to the State of Missouri, a title to four sections of land was vested in the State, with power to select and locate the particular land; and when the selection was made by authorized commissioners, and notified to the surveyor-general, the title became attached to the particular land so selected. *Ib.*
3. The surrounding circumstances considered, and allowed to give a construction to an act of congress making a grant of land. *Ib.*
4. A location under a New Madrid certificate amounted to an exchange of the land at New Madrid for the land located, and could not be made without the knowledge of the owner of the New Madrid claim. *Ib.*
5. A patent which reserved the rights of settlers in the village of Peoria as granted by acts of May 15, 1820, (3 Stats. at Large, 605,) and March 3, 1823, (3 Stats. at Large, 786,) gave no title as against such a settler, who may recover the land, in an action of ejectment, against the patentee, though the settler's patent was of a subsequent date. *Ballance v. Forsyth*, 13 H. 18....362.
6. After the 10th February, 1763, the date of the definitive treaty of peace between Great Britain, France, and Spain, by which the territory between the rivers Mississippi and Perdido was ceded to Great Britain, the French authorities could not grant lands therein. *Montault v. United States*, 12 H. 47....23.
7. Where a concession was made by the Spanish governor of Louisiana in 1799, and no survey was made and no possession taken, and no act done under it until it was produced in court, in 1846; held, that the incipient title must be presumed to have been extinguished. *United States v. Hughes*, 13 H. 1....349.
8. The previous decision affirmed, and applied to the facts of this case. *Ib.* 13 H. 4....352.
9. The two previous decisions affirmed and applied to this case. *Ib.* 13 H. 7....354.
10. A claim founded on a Spanish order of survey, no possession having been taken, and no survey made, nor any act done under the alleged title since 1791, when the order of survey was issued, held to have been abandoned and the inchoate title extinguished. *United States v. Simon*, 12 H. 433....225.
11. A paper extracted from a Spanish register of land titles in Louisiana, purporting to contain only the recitals which usually precede a Spanish title in form, but adding no words of grant, held not to be evidence of any title. *United States v. Le Blanc*, 12 H. 435....227.
12. Some account of the officers by whom the power to grant lands in Louisiana was exercised, under the Spanish authorities. *United States v. Moore*, 12 H. 209 ...106.
13. A claim under an alleged purchase from the Spanish authorities, held, upon the evidence, and the presumptions arising from the lapse of time and the surrounding circumstances, to have been extinguished, by the Spanish authorities before the cession of Louisiana to the United States. *Ib.*
14. The district court, proceeding under the act of May 26, 1824, (4 Stats. at Large, 52,) cannot make an indefinite decree, in favor of the petitioner, for such quantity

- of land as the United States may have sold of the land adjudged to belong to him; the precise quantity must be ascertained by the decree; and it is to this end, in part, that the act requires those in possession of any part of the land claimed by the petitioner, to be made parties. *United States v. Moore*, 12 H. 209....106.
15. Though the amendatory and repealing clauses of the acts of May 23, 1828, (4 Stats. at Large, 284,) and May 24, 1828, (4 Stats. at Large, 298,) do not require adverse claimants to be made parties to a petition, yet the act of June 17, 1844, (5 Stats. at Large, 676,) which revived and extended the act of 1824, does not incorporate those provisions in either of these acts of 1828, and, proceeding under this act of 1844, adverse claimants must be made parties. *Ib.*
16. Grants made by the French authorities in Louisiana, after the date of the treaty of Fontainebleau, (8 Stats. at Large, 200,) held void, unless continued possession laid a foundation for presuming a confirmation by the authorities of Spain, in which case, as the titles would be complete and legal, a remedy is not afforded by the act of May 26, 1824, (4 Stats. at Large, 52,) but the titles are to be tried in the usual modes, under the laws and practice of the State. *United States v. Pillerin*, 13 H. 9....355.
17. Petition dismissed without prejudice. *Ib.*
18. A petition to confirm a Spanish title in Louisiana, under the act of May 26, 1824, (4 Stats. at Large, 52,) must contain an allegation of the residence of the grantee in Louisiana, at the date of the grant, or previous to March 10, 1804; and the title shown must not be a complete title. *United States v. Castant*, 12 H. 437....228.
19. The act of May 26, 1824, (4 Stats. at Large, 52,) revived by the act of June 17, 1844, (5 Stats. at Large, 676,) limits the right to file a petition under a French or Spanish grant, to two years from the passage of the latter act. *United States v. Porche*, 12 H. 426....223.
20. Though the commandant of the port of New Madrid, in upper Louisiana, had power, as the deputy of the Spanish governor of the province, to enter into a contract to grant lands in consideration of the introduction of a colony, &c., and though the facts set forth in his order as the motives of the agreement must be taken as true, yet, before the grantee could apply for a title in form, he must, according to the laws and usages of Spain, have complied with the conditions which formed the consideration of the grant; and as the United States have succeeded to the rights and duties of the Spanish crown, touching this subject, the applicant, who has failed to perform those conditions, cannot demand a title from the United States, under the act of May 26, 1824, (4 Stats. at Large, 52,) revived by the act of June 17, 1844, (5 Stats. at Large, 676.) *Glenn v. United States*, 13 H. 250....480.
21. The time allowed by the United States for performance of such conditions in grants of this character, did not run after the date of the act of March 26, 1804, (2 Stats. at Large, 287, § 14,) and it was competent for the political department of the government thus to limit the time. *Ib.*
22. The principles of the preceding case, *Glenn v. United States*, 13 H. 250, applied to this case, and the petition dismissed. *De Villmont's Heirs v. United States*, 13 H. 261....489.
23. The petition of the appellees, founded on a British grant, dismissed, because, if any title was made thereby, it was a complete legal title, and the district court had not jurisdiction under the act of May 26, 1824, (4 Stats. at Large, 52,) as revived by the act of June 17, 1844, (5 Stats. at Large, 676.) *United States v. McCullagh*, 13 H. 216....465.
24. Under the act of May 20, 1826, (4 Stats. at Large, 179,) granting lands for the support of schools, the secretary of the treasury had power to decide, as between the school trustees for a township and one claiming under a private entry, whether the land in question had been duly selected and set apart for the schools of the township; and his decision was final. *Campbell v. Doe*, 13 H. 244....477.

PURCHASE.

DEED, 1.

RAILROAD.

CONSTITUTIONAL LAW, 4; CONTRACT, 2.

RECORD.

A paper found on the files of the court in a case, purporting to show how notice was given in that case, but contradicting the entry on the record that due notice was given, is not a part of the record, nor entitled to any effect. *Sargeant v. State Bank of Indiana*, 12 H. 371....190.

COURTS OF THE UNITED STATES, 9; EVIDENCE, 1. 2. 13-15; EXCEPTIONS, 3.

RECOUPMENT.

DAMAGES, 3.

RESCISSION OF CONTRACT.

CONTRACT; MISTAKE.

REVENUE LAWS.

1. Though generally, the name by which an article is known in commerce, is taken to include that article in a revenue law, yet, by a course of legislation, it may be made apparent that congress did not intend to include a particular article under a name, which, among commercial men, would include it. *De Forest v. Lawrence*, 13 H. 274....495.
2. This principle applied to dried sheepskins, having the wool on, under the act of July 30, 1846, (9 Stats. at Large, 42.) *Ib.*
3. Under the tariff act of July 30, 1846, (9 Stats. at Large, 44, sched. B,) glass tumblers, having the entire surface or bottom smoothed, or polished, or their sides figured or ornamented by cutting, or grinding, are "glass cut," and subject to a duty of 40 per centum *ad valorem*. *Binns v. Lawrence*, 12 H. 9....7.
4. Under the tariff act of July 30, 1846, (9 Stats. at Large, 42,) only the quantity of brandy imported, not that shown by the invoices, is dutiable; but as this act lays upon it an *ad valorem* duty, the allowance for leakage of two per centum of quantity gauged, cannot be made under the 59th section of the collection act of 1799, (1 Stats. at Large, 672,) because that law applied only to liquors subject to duty by the gallon. *Lawrence v. Caswell*, 13 H. 488....612.
5. Under the warehousing act of August 6, 1846, (9 Stats. at Large, 53,) an importer had not a right, as soon as the law was passed, and independently of any regulations by the secretary of the treasury, to land his goods at the port of delivery to which they were destined, and store them there, on giving such bonds as that act required. *Tremlett v. Adams*, 13 H. 295....507.
6. The act was confined to ports of entry, until extended by the action of the secretary, to ports of delivery. *Ib.*

CONSTITUTIONAL LAW, 1-3; COURTS OF THE UNITED STATES, 14.

RIGHT TO BEGIN.

EXCEPTIONS, 2.

RIVER.

NUISANCE.

SALE.

DEED, 1-4; EQUITY, 1; EXECUTION; JUDGMENT, &c.; LIEN; MORTGAGE, 1-4. 3;
PRIZE, 2-6; SLAVES; TAXES; TRUST, 1.

SCHOOLS.

PUBLIC LANDS, 24.

SCIRE FACIAS.

BAIL; EXECUTION.

SEAL.

DEED, 6.

SEISIN AND DISSEISIN.

LIMITATIONS OF SUITS, 1. 2.

SET-OFF.

DAMAGES, 3.

SHIPS AND SHIPPING.

1. Damage done to cotton thread, by dampness of the hold of the vessel, not occasioned by bad stowage, or any negligence of the master, or mariners, is an "accident of navigation," within the exception in a bill of lading. *Clark v. Barnwell*, 12 H. 272130.
2. If damage be done by an accident, or peril, excepted in the bill of lading, the shipper must *prima facie* bear the loss; but he may impose it on the master or owners, or on the vessel, by proving that the negligence of the master, or mariners, made the excepted peril or accident operative on his goods. *Ib.*
3. If it is usual to carry salt as part of the cargo of a general ship, it is not negligence to take it on board; and the owner of goods, liable to be injured by its presence in the hold, must bear the loss occasioned thereby, if there was no bad stowage, and no inquiry made by the shipper, before the goods were put on board. *Ib.*
4. A carrier is not responsible for the consequences of delay of the voyage not attributable to misconduct of his servants. *Ib.*
5. A bill of lading, containing the usual clause, "shipped in good order, &c.," and adding "contents unknown," acknowledges only the fair external appearance of the packages, and the burden is on shipper to prove the condition of their contents when they came on board. *Ib.*
6. A question of fact as to the cause of damage to goods in the hold of a vessel. *Rick v. Lambert*, 12 H. 347....171.

COLLISION.

SLAVES.

The statute of Mississippi, of June, 1822, respecting the sale of slaves brought into that

State, does not make void a note given for the price of such slaves. *Harris v. Runnels*, 12 H. 79....38.

DAMAGES, 3. 4; FUGITIVES FROM SERVICE; MORTGAGE, 7.

SPAIN.

PUBLIC LANDS, 7-22.

SPECIFIC PERFORMANCE.

Upon a bill for specific performance of a contract to convey land, *held*, that the complainant was not entitled to a decree. 1. Because he had shown no performance or offer to perform, on his own part. 2. Because an agreement to convey in consideration of payments to be made out of the profits of the vendor's lands, was not a contract which a court of equity would enforce. 3. That the complainant had abandoned and released his claim. *Dorsey v. Packwood*, 12 H. 126....61.

EQUITY, 1.

STATE.

BILL OF CREDIT; CONSTITUTIONAL LAW, 1-3; COURTS OF THE UNITED STATES, 15-17.

STATE COURT.

COURTS OF THE UNITED STATES, 6-13, 15-17; POST-OFFICE, &c. 3.

STATUTES.

Though by the fundamental law of a territory its legislation is to be subject to the disapproval of congress, yet till disapproved it is valid and operative; it does not owe its effect to the action of congress thereon, so as to become an act of congress. *Miners' Bank of Dubuque v. Iowa*, 12 H. 1....1.

CONSTITUTIONAL LAW, 4; COURTS OF THE UNITED STATES, 3; CUMBERLAND ROAD; FUGITIVES FROM SERVICE; INDIANA; REVENUE LAWS, 1. 2.

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- 1849, March 3, Relief of Peter Capella, &c. 9 Stats. at Large, 788.
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SUPERSEDEAS.

An appeal claimed and allowed, and an appeal bond given, in an action at law, do not operate as a *supersedeas*; a writ of error sued out after the expiration of ten days from the judgment day, cannot so operate; and no court of the United States has any equitable power to correct the mistake and set aside an execution in such a case. *Saltmarsh v. Tuthill*, 12 H. 387....200.

SURETY.

BOND; DAMAGES, 3. 4; EVIDENCE, 7. 8.

TAXES.

Where a tax was assessed on a whole fractional quarter section, embracing several village lots, and the sale for its non-payment was of an "acre off the east side," the sale was held void. *Ballance v. Forsyth*, 18 H. 18....362.

CUMBERLAND ROAD; EVIDENCE, 9; LIMITATIONS OF SUITS, 1. 2.

TERRITORY.

COURTS OF THE UNITED STATES, 8; STATUTES.

TEXAS.

MORTGAGE, 9.

TRADE WITH THE ENEMY.

ARMY, &c.

TREATY.

PUBLIC LANDS, 6. 16. 17.

TRESPASS.

COURTS OF THE UNITED STATES, 1; DAMAGES, 2-4.

TRIAL.

COURTS OF THE UNITED STATES, 16. 17.

TROVER.

POST-OFFICE, &c. 3.

TRUST.

Trustees to sell must unite in the sale and conveyance to pass any title to property held by them jointly. *Wilbur v. Almy*, 12 H. 180....89.

DEED, 1-3.

UNION BANK OF LOUISIANA.

HUSBAND AND WIFE.

. UNITED STATES.

The 7th section of the act of May 1, 1820, (3 Stats. at Large, 568,) does not prevent the acquisition of the legal title to land by the United States, when taken as security for a debt by the proper officer, though not specially required or authorized by any particular act of congress. *Neilson v. Lagow*, 12 H. 98....46.

COURTS OF THE UNITED STATES, 4.

USURY.

The addition of the current rate of exchange to the legal rate of interest is not usury, because the former is taken, not for the loan or forbearance of the money, but as a compensation for receiving it at a place where it is expected to be less valuable than at the place where the loan is made. *Buckingham v. McLean*, 18 H. 150....440

VENDOR AND PURCHASER.

LIEN, 1.

VERDICT.

The statute of jeofails (1 Stats. at Large, 91, § 32,) applies to defects in verdicts; and where this court can see from the verdict, what was the substantial finding of the jury, and that it covered what was in issue, the judgment will not be reversed by reason of any defect in the form of the verdict. *Parks v. Turner*, 12 H. 39....18.

COURTS OF THE UNITED STATES, 15.

VIRGINIA.

LIEN, 2; NUISANCE.

WAIVER.

COURTS OF THE UNITED STATES, 18; DEPOSITION; MORTGAGE, 5; PLEADING, 1

WHEELING BRIDGE

NUISANCE.

WITNESS.

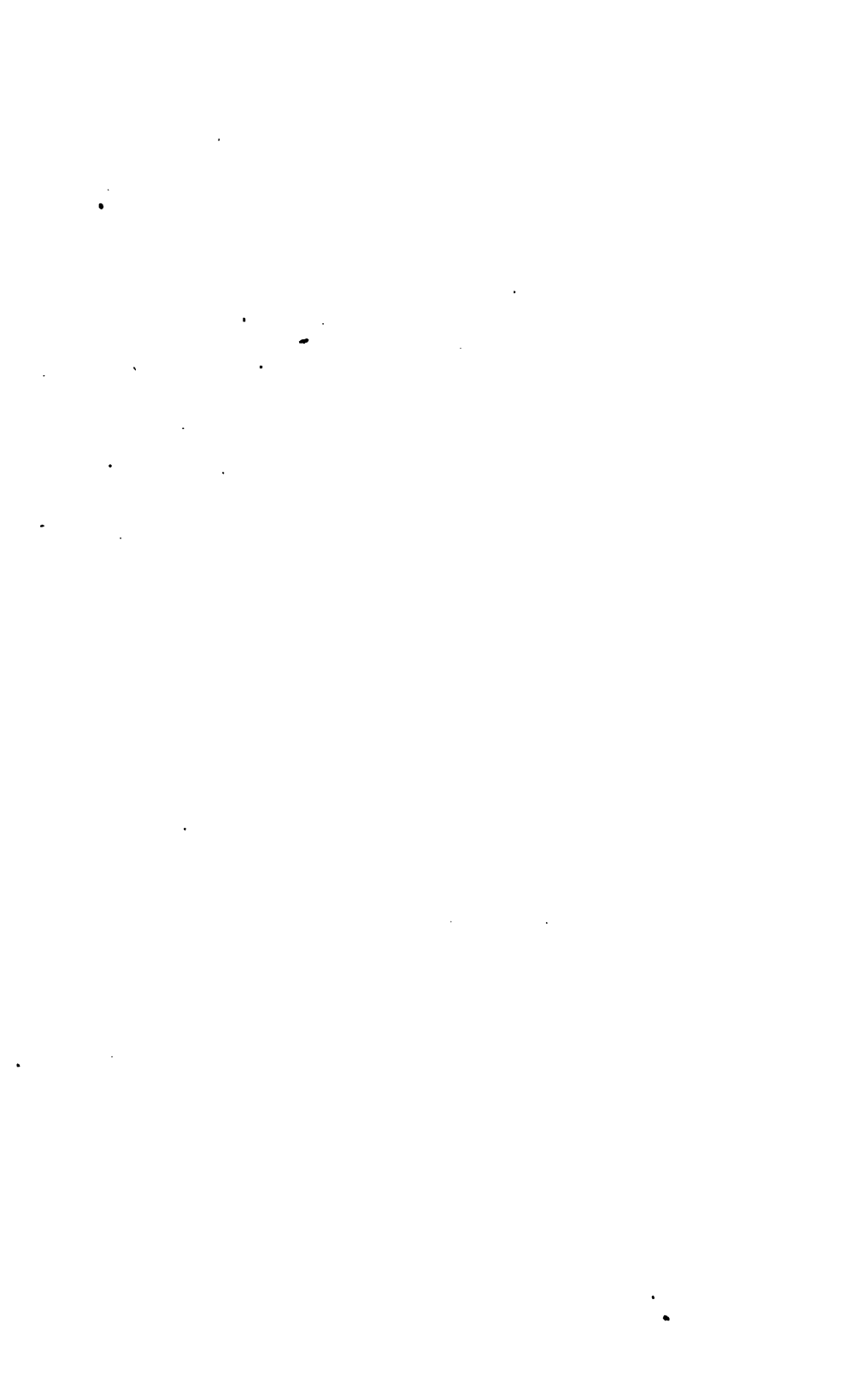
A party to a bill is incompetent to prove any fact which, taken in connection with other facts, cuts off a part of the nominal amount of such bill. *Saltmarsh v. Tutthill*, 13 H. 229....468.

WRIT OF ERROR.

- .. A writ of error which did not set out the names of all the parties to the judgment of the circuit court, was dismissed. *Smyth v. Strader*, 12 H. 327....160.
 - 1. When a case comes here by a writ of error to the circuit court in Louisiana, and it appears that the whole case, both upon the law and the fact, was submitted to the judge without a jury, the admission or rejection of evidence merely, though excepted to, cannot be assigned for error. *Weems v. George*, 13 H. 190....458.
 - 3. If a case at law in Louisiana, is submitted to the judge without a jury, and no exception is taken to any ruling on any matter of law, the finding is conclusive, and the judgment must be affirmed on error. *Bond v. Brown*, 12 H. 254....121.
 - 4. An exception having been taken to the refusal of the court below to continue the case, the judgment was affirmed with ten per cent. damages, on the ground that the writ of error was sued out merely for delay. *Barrow v. Hill*, 13 H. 54... 382.
- ARMY, &c. 6; BAIL, 2; COURTS OF THE UNITED STATES, 6-12. 14. 19; EXCEPTIONS; PLEADING, 4. 5; SUPERSEDEAS.







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